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Preface

This Third Edition of the California Tort Guide, like its predecessors, is designed to aid practicing attorneys. It states and illustrates the principles of tort liability and the defenses that are applied to resolve the great majority of personal injury, wrongful death, and property damage claims. The book provides a convenient reference to the legal rules that mandate what must be proved to establish liability and what can be proved to defeat it. In the office, the book can help an attorney who hears a client's story or scans a file to find governing principles and to identify controlling statutes and cases. In the courtroom or in chambers, it can furnish fast and authoritative answers to unanticipated questions. The attorney preparing a memorandum or a brief can use it to find controlling authorities and as a springboard for further research.

Chapter 1, General Principles, covers such underlying concepts as duty, foreseeability, comparative fault, and assumption of risk, that are invoked by our courts in a variety of factual situations. Chapters 2 through 12 show how tort law principles are applied in common liability situations. As before, the Third Edition focuses on current liability rules, eschewing extended discussion of legal history or philosophy. Points are supported, not by a string of citations, but by the key authority, the most recent case applying the principle, and, when appropriate, additional cases that show situations in which the principle has been applied or distinguished. Questions about cited authorities are raised in indented "Note" paragraphs.

This Third Edition was planned and written by the late Judge William B. Boone (retired) of Santa Rosa and by Paul Peyrat of Sonoma, who thank CEB Attorney Deborah Magers-Rankin for preparing Chapter 8 (Governmental Liability). Attorney-consultants who read the manuscript and provided valuable commentary are Jeffery J. Carlson of Santa Monica, Joel W. H. Kleinberg of Los Angeles, Joseph W. Rogers of San Francisco, and e. robert (bob) wallach of San Francisco.

The Third Edition, with its many new and rewritten sections, also uses material from previous editions and updates. William B. Boone and e. robert (bob) wallach were the authors of the 1971 First Edition and Paul Peyrat the principal legal editor, aided by CEB Attorneys Guy Blandin Colburn and Siegfried Hesse. Boone and Peyrat prepared Updates to the First Edition. After Boone's appointment to the Superior Court bench, Peyrat prepared the 1979 Second Edition. Daniel U. Smith of Kentfield, Jeffery J. Carlson, and Paul Peyrat wrote Second Edition Updates with valuable contributions from Deborah A. Lee-Germain of Santa Monica and CEB Attorneys Christopher D. Dworin and Robert N. Waxman. Cinda Ely handled Third Edition production and copyediting. Legal research assistance was provided by Elliot Cohen, Enrique De Anda, Jeff Meyers, Erin Newman, Ken Scudder, Mindy Spatt, and Tova L. Zeff. Phyllis A. Hartke prepared the index. The book designer was Cheryl Ventimiglia. Composition was performed by CEB's Electronic Publishing staff. The March 2009 update added a new chapter, Chapter 13, on pharmaceutical and medical device litigation, written by Kenneth Seeger of Seeger Salvas, San Francisco. CEB wishes to thank Mr. Seeger for sharing his extensive knowledge and experience in this practice area with readers of the Tort Guide. CEB also wishes to thank aviation litigation specialist Susie Injijian of Berkeley for contributing her expertise to the update of Chapter 2, Airplanes.

December 2009 Update

Book author Paul Peyrat, Sonoma, prepared this update. CEB Attorney Editor David Saunders and Legal Editor Enrique DeAnda contributed to this title. Administrative support was provided by Kenya Denman and Nila Kanzaria. Richard Dempewolf handled copyediting and production. Kathryn Te Selle updated the index. Composition was performed by CEB's Electronic Publishing staff.

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In Memoriam

The Honorable William B. Boone, Judge of the Sonoma County Superior Court, Retired, died on October 25, 2007. He was the principal author of the first edition of the California Tort Guide and contributed, until recently, to subsequent editions and updates. Born in 1924, he served in the United States Army, graduated from Hastings College of the Law in 1950, and was admitted to the California Bar in 1951. He served as a superior court judge from appointment in 1977, through election in 1978, until retirement in 1985, and was in private practice. He was a speaker on educational programs for Continuing Education of the Bar and other organizations, an instructor at Empire College of Law, and an author not only of the Tort Guide, but also of law review articles, chapters in other books, and other materials. His contributions to legal scholarship and to the education and mentoring of practitioners will long survive; his anticipated further contributions to the Tort Guide will be missed.

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Selected Developments

December 2009 Update

The California Supreme Court ruled on the liability for the alleged mishandling of human remains. See *Conroy v Regents of Univ. of Cal.* (2009) 45 C4th 1244, 91 CR3d 532, in §1.2.

School districts, despite immunity statutes, can be liable when negligent supervision results in injury or sexual assault. See *K.J. v Arcadia Unified Sch. Dist.* (2009) 172 CA4th 1229, 92 CR3d 1, in §1.29.

A homeowner who installs a volleyball net in his front yard cannot invoke the primary assumption of risk defense when a child trips over a support line. See *Luna v Vela* (2008) 169 CA4th 102, 86 CR3d 588, in §§1.51, 10.46.

"Pervasive regulations" issued by the Federal Aviation Administration may have a preemptive effect on state lawsuits. See *Martin v Midwest Express Holdings, Inc.* (9th Cir 2009) 555 F3d 806, in §2.19.

A horse racing steward who refuses to scratch a horse from a race has acted outside his authority and cannot use the public employee discretionary immunity defense. See *Jamgotchian v Slender* (2009) 170 CA4th 1384, 1399, 89 CR3d 122, in §§3.34, 8.11.

Alleged recklessness in a vehicle pursuit does not give rise to liability for shooting a fleeing driver after a foot chase had begun. See *Hernandez v City of Pomona* (2009) 46 C4th 501, 517, 94 CR3d 1, in §4.82.

A transit vehicle passenger injured when the vehicle rear-ends a car is entitled to a res ipsa loquitur instruction in a suit against the carrier. See *Diaz v Los Angeles County Metropolitan Transp. Auth.* (2009) 175 CA4th 1297, 96 CR3d 780, in §5.15.

A carrier by sea that has opted out of Carmack Amendment protections can be liable for damage to freight in a railroad derailment after transfer from the ship. See *Regal-Beloit Corp. v Kawasaki Kisen Kaisha Ltd.* (9th Cir 2009) 557 F3d 985, in §5.21.

A "Himalaya clause" in a shipping agreement can allow vessel owners and others to invoke forum selection provisions in a shipping agreement. See *Mazda Motors of Am. v M/V Cougar Ace* (9th Cir 2009) 565 F3d 573, in §5.31.

CalOSHA workplace safety regulations are not ordinarily applied to homeowners. See *Cortez v Abich* (2009) 177 CA4th 261, 98 CR3d 830, in §6.4.

The California Supreme Court has agreed to review a decision that a self-employed independent contractor could recover damages from a negligent hirer despite the ruling in *Privette* and its progeny. See *Tverberg v Fillner Constr. Co.* (review granted Feb. 25, 2009, S169753; superseded opinion at 168 CA4th 1278, 86 CR3d 265), in §6.12.

It is a fact question whether a utility's placement of a light post 18 inches from a curb was negligence that contributed to injury to passengers in a vehicle that hit the post after a collision. See *Laabs v Southern Cal. Edison Co.* (2009) 175 CA4th 1260, 97 CR3d 241, in §§7.4, 10.41.

The recreational use immunity provided to property owners can be invoked by utilities that maintain power transmission towers on which climbing children are injured. See *Prince v PG&E* (2009) 45 C4th 1151, 90 CR3d 732, in §§7.13, 10.26.

A public employee seeking indemnity for expenses incurred while conducting entity business must first have asked for reimbursement and filed a timely claim, then establish that the acts for which indemnity is sought were within the scope of his or her public employment. See *Sparks v Kern County Bd. Of Supervisors* (2009) 173 CA4th 794, 93 CR3d 173, in §8.8.

The equitable delayed discovery rule may extend the time within which suit must be brought against a public entity by setting a later than usual accrual date for the cause of action. See *K.J. v Arcadia Unified Sch. Dist.* (2009) 172 CA4th 1229, 92 CR3d 1, in §8.39.

Medical battery liability has two aspects: (1) situations in which the doctor performs a procedure without having obtained the patient's consent, and (2) situations in which conditional consent was given and the doctor intentionally proceeds although the condition has not been satisfied. See *Dennis v Southard* (2009) 174 CA4th 540, 94 CR3d 559, in §9.16.

A third party administrator's negligent failure to inform a patient that he or she is entitled to an independent external review after denial of a form of treatment as "investigational" can subject a health insurance plan to liability when the untreated patient's condition worsens. See *Mintz v Blue Cross of Cal.* (2009) 172 CA4th 1594, 92 CR3d 422, in §9.68.

Courts of appeal have split on whether a patient's agreement to arbitrate disputes is binding on the patient's spouse and children suing for the patient's death. See *Ruiz v Podolsky* (2009) 175 CA4th 227, 95 CR3d 828, in §9.80.

A owner's duty to maintain the elevators in a building is nondelegable so that fault attributed to a hired maintenance company does not reduce the landlord's liability. See *Koepnick v Kashiwa Fudosan Am., Inc.* (2009) 173 CA4th 32, 92 CR3d 453, in §10.15.

A landlord can be sued by a tenant for failing to control smoking in common areas when second-hand smoke exacerbates tenant's asthma. See *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602, in §10.33.

A manufacturer cannot be liable for failing to warn of asbestos emissions from products made by others and merely used in conjunction with its product. See *Taylor v Elliott Turbomachinery Co.* (2009) 171 CA4th 564, 90 CR3d 414, in §§11.17, 11.29.

Federal statutes may preempt state law claims for injury resulting from the use of guns by criminals and from use of the Internet. See *Julie Doe II v MySpace, Inc.* (2009) 175 CA4th 561, 96 CR3d 148, in §11.45.

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Cutoff Dates and CEB Citation

Cutoff Dates

We completed legal editing and analysis of authorities cited in this publication as of August 17, 2009, and monitored developments through October 21, 2009.

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I. INTRODUCTION

§1.1 A. Scope Note

This chapter covers underlying tort law principles. Other chapters show how these and other principles are applied in common injury and liability situations. The reader may prefer to start with the chapter that covers the situation in his or her case, turning to chap 1 only (1) when referred to it by another chapter, (2) if no other chapter covers the situation, or (3) for discussion of such underlying tort law concepts as negligence, duty, assumption of the risk, and comparative fault.

The Continuing Education of the Bar—California (CEB) books (each with its current update booklet or replacement pages) that cover other aspects of the pursuit and defense of tort lawsuits include the following:

- On pretrial and trial procedures, see California Civil Procedure Before Trial (4th ed Cal CEB 2004), California Civil Discovery Practice (4th ed Cal CEB 2006), and California Trial Practice: Civil Procedure During Trial (3d ed Cal CEB 1995);
- On the measure and proof of personal injury, personal property, and wrongful death damages, see California Tort Damages (2d ed Cal CEB 2002);
- On eliciting testimony and laying foundations for exhibits, see California Personal Injury Proof (Cal CEB 1970).

The traditional intentional torts (assault and battery, libel and slander (defamation), invasion of privacy, malicious prosecution, abuse of process, and false arrest and imprisonment) are covered in Tort Damages, chaps 7-12. Fraud and misrepresentation torts are not covered except in connection with specific injury situations. See, *e.g.,* §9.19 (medical malpractice) and §11.73 (product liability). On the elements of fraud causes of action, see generally *Molko v Holy Spirit Ass'n* (1988) 46 C3d 1092, 1108, 252 CR 122; *Anderson v Deloitte & Touche LLP* (1997) 56 CA4th 1468, 66 CR2d 512.

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B. New Torts

§1.2 1. Generally

This book covers liability rules and defenses that are applied in common tort liability situations, but it is well to remember that, according to Prosser (see Prosser and Keeton on Torts §1, p 3 (5th ed 1984), as quoted in *Smith v Superior Court* (1984) 151 CA3d 491, 495, 198 CR 829, disapproved on other grounds in *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 18 n4, 74 CR2d 248):

> New and nameless torts are being recognized constantly, and the progress of the common law is marked by many cases of first impression, in which the court has struck out boldly to create a new cause of action, where none had been recognized before.… The law of torts is anything but static, and the limits of its development are never set. When it becomes clear that the plaintiff's interests are entitled to legal protection against the conduct of the defendant, the mere fact that the claim is novel will not of itself operate as a bar to the remedy.

See, *e.g., Dale v Dale* (1998) 66 CA4th 1172, 78 CR2d 513 (tort liability of spouse and accountant who concealed community assets during divorce proceeding; criticized in *Kuehn v Kuehn* (2000) 85 CA4th 824, 834, 102 CR2d 743); *Ross v Forest Lawn Mem. Park* (1984) 153 CA3d 988, 203 CR 468 (failure to exclude interlopers from funeral services); *Kathleen K. v Robert B.* (1984) 150 CA3d 992, 198 CR 273 (transmitting genital herpes). *Newman v Sathyavaglswaran* (9th Cir 2002) 287 F3d 786 (coroner's removal of corneas from dead bodies of children violated parents' property interests). See Annos, 97 ALR5th 419 (2002) (liability in conjunction with autopsy), 74 ALR5th 1 (1999) ("wrongful adoption" causes of action based on nondisclosure of child's disabilities to adoptive parents).

A court may create a new tort by deciding that a defendant's conduct breached a duty (to preserve the plaintiff from harm or loss) imposed by statute, contract, or otherwise. See *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 8, 74 CR2d 248. See §1.9 on a court's role in determining duty. See Anno, 23 ALR6th 457 (2007) ("deepening insolvency" as tort cause of action).

Statutes may create new torts or modify the criteria for traditional torts. See, *e.g.,* CC §§1708.5 (sexual battery), 1708.6 (domestic violence), 1708.7 (stalking), and 1708.8 (invasion of privacy). See also *Pugliese v Superior Court* (2007) 146 CA4th 1444, 1451, 53 CR3d 681 (legislature made domestic violence "continuing tort" for which 3-year statute of limitations did not begin to run until "last act" of violence).

Further, a defendant's violation of a criminal statute that embodies a public policy may create a cause of action for damages even when the statute provides no specific civil remedy. *Angie M. v Superior Court* (1995) 37 CA4th 1217, 1224, 44 CR2d 197 (minor could state cause of action for unlawful seduction and sexual abuse in addition to causes of action for battery and intentional infliction of emotional distress).

NOTE: A court has recognized a claim for damages and other statutory relief against an adult child who abuses an elderly parent, financially and physically, in violation of the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15705.40). See *Estate of Lowrie (Goodreau v Lowrie)* (2004) 118 CA4th 220, 12 CR3d 828 (grandchild alleged that her uncle abused her grandmother). See §§9.29, 9.58 on suits under the EADACPA against health care providers. See generally Chafetz, *Why Plaintiffs Prefer Pleading Elder Abuse to Medical Malpractice*, 36 CAOC Forum No. 1, p9 (Consumer Attorneys of California), Jan./Feb. 2006.

On the other hand, not every form of allegedly wrongful conduct gives rise to tort liability. See, *e.g., Conroy v Regents of Univ. of Cal.* (2009) 45 C4th 1244, 91 CR3d 532 (general allegations of irregularities in donated body program failed to show mishandling of particular decedent's remains); *Katzberg v Regents of Univ. of Cal.* (2002) 29 C4th 300, 127 CR2d 482 (allegations that defendants deprived plaintiff of liberty by failing to provide "name-clearing" hearing after his removal as department head not sufficient to state cause of action for "constitutional tort"); *Degrassi v Cook* (2002) 29 C4th 333, 127 CR2d 508 (allegations that defendants interfered with city council member's performance of her duties insufficient to create liability for violation of right to free speech). See also *Shin v Kong* (2000) 80 CA4th 498, 95 CR2d 304 (man cannot recover damages from former wife's doctor alleged to have artificially inseminated wife with doctor's sperm); *Fluharty v Fluharty* (1997) 59 CA4th 484, 69 CR2d 244 (son's suit against father for injury caused

by father's suicide attempt rejected); *Alexandria S. v Pacific Fertility Med. Ctr.* (1997) 55 CA4th 110, 64 CR2d 23 (policy considerations bar damages suit by child conceived through artificial insemination against clinic that failed to confirm consent of husband who later obtained "no-support" decree); *Perry v Atkinson* (1987) 195 CA3d 14, 240 CR 402 (no action for fraud or deceit can apply to the intensely private choice of whether to conceive a child—even if it were true that defendant deliberately misrepresented his intentions to plaintiff so as to persuade her to have an abortion, falsely promising to impregnate her the following year). See Anno, 2 ALR5th 301 (1992) (sexual partner's tort liability to other partner for misrepresentation).

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§1.3 2. Spoliation of Evidence

Spoliation of evidence was recognized as a new tort in California in 1984. See *Smith v Superior Court* (1984) 151 CA3d 491, 198 CR 829, disapproved in *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 18 n4, 74 CR2d 248. See also cases noted below.

Since 1998, however, this tort has been limited in scope, perhaps to the point of extinction. For example, a party to a lawsuit who claims that a "third party" (someone not a party in the lawsuit) intentionally destroyed or suppressed evidence that would have aided the party in the lawsuit may not recover tort damages from that third party under the spoliation of evidence theory. *Temple Community Hosp. v Superior Court* (1999) 20 C4th 464, 84 CR2d 852. Similarly, a party who loses an advantage in a lawsuit because evidence was destroyed or suppressed by a "first party" (a party or other person involved in the same lawsuit), cannot pursue a tort claim against that other party (unless, perhaps, the disadvantaged party did not know, and should not have known, of the destruction or suppression of evidence before the lawsuit was concluded). *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 74 CR2d 248. See *Penn v Prestige Stations, Inc.* (2000) 83 CA4th 336, 99 CR2d 602 (*Cedars-Sinai* applied retroactively to case on appeal); *Hassoldt v Patrick Media Group, Inc.* (2000) 84 CA4th 153, 160, 100 CR2d 662 (same). Nonliability for spoliation applies to a public entity accused of intentionally or negligently destroying court records relating to a prior suit, even though defendants had a statutory duty to preserve the records, and the loss, by making an appeal impossible, required a new trial. See *Forbes v County of San Bernardino* (2002) 101 CA4th 48, 123 CR2d 721.

NOTE: For discussion of the possible exception that might permit a spoliation cause of action if the victim did not know (and should not have known) of the spoliation before the trial or other decision on the merits in the underlying action, see *Megaree v Wittman* (ED Cal 2006) 2006 US Dist Lexis 78954.

Temple and *Cedars-Sinai* appear to leave no room for a cause of action for *negligent* spoliation of evidence. See *Lueter v State* (2002) 94 CA4th 1285, 115 CR2d 68 (law enforcement agency employees discarded tire tread that could have shown that truck driver sued by other motorists was not responsible for accident); *Farmers Ins. Exch. v Superior Court* (2000) 79 CA4th 1400, 95 CR2d 51 (automobile insurer for person injured in single-vehicle accident apparently caused by defective tire took possession of car and tire, then lost or destroyed them).

There remains the possibility that a person could be liable for loss resulting from breach of a contractual obligation to preserve evidence (or even a voluntary agreement to do so). See *Copprich v Superior Court* (2000) 80 CA4th 1081, 1091, 95 CR2d 884 (persons injured in rented car when tire blew out alleged that they had asked dealer and its insurer to preserve car and tire for use as evidence, but were later told that they no longer existed or had been sold).

NOTE: For "pre-*Temple*" decisions on spoliation of evidence as a tort, see *Galanek v Wismar* (1999) 68 CA4th 1417, 81 CR2d 236 (noted in §1.16); *Hernandez v Garcetti* (1998) 68 CA4th 675, 80 CR2d 443 (noted in §8.39); *Johnson v United Servs. Auto. Ass'n* (1998) 67 CA4th 626, 79 CR2d 234 (kinds of spoliation actions viable after *Cedars-Sinai*); and *Gomez v Aquistapace* (1996) 50 CA4th 740, 57 CR2d 821 (noted in §6.1).

See generally Smith and Hansen, *The Short Life of a Tort: A Brief History of the Independent Cause of Action for Spoliation of Evidence in California,* 35 CAOC Forum No. 8, p 38 (Consumer Attorneys of California), Oct. 2005. See Annos, 3 ALR6th 13 (2005) (electronic spoliation of evidence), 121 ALR5th 157 (2004) (spoliation in contexts other than product liability), 102 ALR5th 99 (2002) (spoliation in product liability actions), 101 ALR5th 61 (2002) (actionability of negligent spoliation that interferes with prospective civil action).

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II. NEGLIGENCE

§1.4 A. Terminology; Ordinary Care Standard

Lawyers use "negligence" in two senses. Broadly, negligence is a tort, *i.e.,* a cause of action or basis (or theory) for imposing liability on a defendant for injury or harm suffered by a plaintiff. Negligence in this sense is distinct from such other liability theories as willful misconduct (see §1.57), strict product liability (see chap 11), and breach of warranty (see §§11.62-11.72).

More particularly, negligence is conduct that falls below a standard established by law for the protection of others against unreasonable risk of harm. See Restatement (Second) of Torts §282 (1965). The standard of conduct applicable to a particular defendant is expressed in terms of a defendant's duty to the plaintiff or to people generally. See §§1.6-1.10 on duty.

Civil Code §1714(a) sets out a basic standard of conduct: "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." See *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 536, 34 CR2d 630 (noted in §1.6); *Rowland v Christian* (1968) 69 C2d 108, 111, 70 CR 97, 99 (CC §1714(a) states civil, not common, law principle); *Lackner v North* (2006) 135 CA4th 1188, 1197, 37 CR3d 863 (also noted in §1.46). See also *Ewing v Cloverleaf Bowl* (1978) 20 C3d 389, 399, 143 CR 13, 17 (defendant liable for reasonably foreseeable injuries caused by failure to exercise reasonable care). Ordinary care is also called "reasonable" or "due" care.

Failure to use ordinary care is defined as doing something that an ordinarily prudent person would not have done, or not doing something that such a person would have done, under the circumstances. *Fouch v Werner* (1929) 99 CA 557, 564, 279 P 183, 186. Other standards, expressed in different terms, are used to measure the conduct of minors (see §1.20), medical doctors (see §9.1), and "carriers of persons for reward" (see §5.6).

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§1.5 B. Negligence Causes of Action: Elements

Actionable negligence has three traditional elements: (1) a legal duty to use due care; (2) breach of that duty; and (3) a proximate or legal causal connection between the breach and plaintiff's injuries. *United States Liab. Ins. Co. v Haidinger-Hayes, Inc.* (1970) 1 C3d 586, 594, 83 CR 418; *Romito v Red Plastic Co.* (1995) 38 CA4th 59, 44 CR2d 834; *E.F. Hutton & Co. v City Nat'l Bank* (1983) 149 CA3d 60, 66, 196 CR 614. See *Paz v State* (2000) 22 C4th 550, 559, 93 CR2d 703 (also noted in §§1.6, 6.16, 10.41); *Friedman v Merck & Co.* (2003) 107 CA4th 454, 463, 131 CR2d 885 (noted in §§1.6, 1.10).

Some courts divide the third element into (3) a reasonably close connection between the defendant's conduct and the resulting injury, commonly called "proximate cause," and (4) actual loss or damage resulting from that injury. See *Mendoza v City of Los Angeles* (1998) 66 CA4th 1333, 1339, 78 CR2d 525 (alleged negligent hiring and supervision); *Koepke v Loo* (1993) 18 CA4th 1444, 1448, 23 CR2d 34. For further discussion, see §1.19.

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Source: Torts/California Tort Guide/1 General Principles/ 1. Duty/§1.6 a. Need for Duty Determination

1. Duty

§1.6 a. Need for Duty Determination

A defendant can defeat a negligence cause of action by convincing a court that, in the circumstances of the case, the defendant owed the particular plaintiff no legal duty to use ordinary care. See, *e.g., Kentucky Fried Chicken v Superior Court* (1997) 14 C4th 814, 59 CR2d 756 (noted in §10.7); *Laico v Chevron U.S.A., Inc.* (2004) 123 CA4th 649, 659, 20 CR3d 307 (noted in §6.10). The threshold element for a negligence cause of action is "a duty to use due care toward an interest of another that enjoys legal protection against unintentional invasion." *Paz v State* (2000) 22 C4th 550, 559, 93 CR2d 703 (also noted in §§1.5, 6.16, 10.41); *Friedman v Merck & Co.* (2003) 107 CA4th 454, 463, 131 CR2d 885 (noted in §§1.5, 1.10). See §1.9 for additional cases in which courts have held that a defendant owed no duty to a plaintiff. See also primary assumption of risk cases in §§1.46-1.53.

A plaintiff, to counter the contention that no duty was owed, can invoke the basic general rule that everyone has the duty to use due care to avoid injuring others. "Duty analysis" (determining whether defendant owed and breached a legal duty) begins with the fundamental policy embodied in CC §1714 that one is liable for injury to another caused by one's failure to exercise ordinary care under the circumstances. *Rowland v Christian* (1968) 69 C2d 108, 111, 70 CR 97, 99; *Kentucky Fried Chicken v Superior Court, supra* (CC §1714 states civil law principle that is foundation of California negligence law); *Lopez v McDonald's Corp.* (1987) 193 CA3d 495, 504, 238 CR 436. Further, any departure from this general rule of duty must be based on statute or clear public policy. *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 536, 34 CR2d 630; *Stapper v GMI Holdings, Inc.* (1999) 73 CA4th 787, 791, 86 CR2d 688.

Under CC §1708 (every person is bound to abstain from injuring the person or property of another) and CC §1714 (see §1.4), each person has a duty to use ordinary care to prevent others from being injured as a result of the person's conduct. *Rowland v Christian, supra*. A defendant owes a duty of care to everyone who is foreseeably endangered by his conduct, with respect to all risks that make the conduct unreasonably dangerous. *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425, 434, 131 CR 14, 22. See §1.10 on foreseeability.

On the other hand, "social policy must at some point intervene to delimit liability," even for foreseeable injury, and "policy considerations may dictate that a cause of action should not be sanctioned no matter how foreseeable the risk." *Parsons v Crown Disposal Co.* (1997) 15 C4th 456, 476, 63 CR2d 291 (ordinarily noisy garbage truck operation breached no duty owed to equestrian on nearby trail).

Courts' rulings that no duty was owed in particular circumstances are said to limit generally "the otherwise potentially infinite liability which would follow from every negligent act." See *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 397, 11 CR2d 51; *Radovich v Locke-Paddon* (1995) 35 CA4th 946, 955, 41 CR2d 573. See also *Sanchez v Lindsey Morden Claims Servs., Inc.* (1999) 72 CA4th 249, 84 CR2d 799 (no legal duty imposed when costs of doing so would outweigh benefits, or when defendant's alleged fault is disproportionately small compared to plaintiff's claimed loss).

Duty is not an immutable (or discoverable) fact of nature but is only an expression of policy considerations that lead a judge or appellate panel to conclude that a particular plaintiff is (or is not) entitled to protection. *Ballard v Uribe* (1986) 41 C3d 564, 572 n6, 224 CR 664; *Tarasoff v Regents of Univ. of Cal., supra*. See *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 8, 74 CR2d 248 (concept of duty is shorthand statement of conclusion rather than aid to analysis in itself); *Dillon v Legg* (1968) 68 C2d 728, 734, 69 CR 72, 76 (asserting that there should be no liability because defendant bears no duty to plaintiff begs essential question of whether plaintiff's interests are entitled to legal protection against defendant's conduct).

More particularly, "duty of care" is a court's expression of the sum total of the policy considerations that lead the law to say that a particular plaintiff is entitled to protection. *Cedars-Sinai Med. Ctr. v Superior Court, supra*. Whether a duty was (or was not) owed is primarily a question of law decided on a case-by-case basis. *Dillon v Legg, supra*. See also *Felburg v Don Wilson Builders* (1983) 142 CA3d 383, 393, 191 CR 92; *Elam v College Park Hosp.* (1982) 132 CA3d 332, 338, 183 CR 156.

The existence of a duty and whether a defendant's conduct constituted a breach of duty are determined in relation to circumstances of time, place, and person. *United States Liab. Ins. Co. v Haidinger-Hayes, Inc.* (1970) 1 C3d 586, 594,

83 CR 418, 422; *Felburg v Don Wilson Builders, supra*.

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§1.7 b. Applying *Rowland* or *Bily* Factors

Rowland v Christian (1968) 69 C2d 108, 113, 70 CR 97, 100, lists eight factors that a judge should consider when deciding whether the defendant owed a duty of care to the plaintiff:

- The foreseeability of harm to the plaintiff;
- The degree of certainty that the plaintiff suffered injury;
- The closeness of the connection between the defendant's conduct and the plaintiff's injury;
- The moral blame attached to the defendant's conduct;
- The policy of preventing future harm;
- The extent of the burden to the defendant;
- The consequences to the community of imposing a duty to exercise care with resulting liability for breach; and
- The availability, cost, and prevalence of insurance for the risk involved.

See *Juarez v Boy Scouts of Am., Inc.* (2000) 81 CA4th 377, 401, 95 CR2d 786 (factors applied to support ruling that Boy Scouts owed duty to troop member to take reasonable measures to protect him from the risk of sexual abuse by adult volunteers); *Adams v City of Fremont* (1998) 68 CA4th 243, 268, 80 CR2d 196 (applying above factors plus, because defendant was public entity, "the extent of the agency's powers; the role imposed on it by law; and the limitations imposed on it by budget" to determine that police owed no legal duty to prevent threatened suicide); *Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 505, 124 CR 467 (applying the first six factors above). See also *Soldano v O'Daniels* (1983) 141 CA3d 443, 451, 190 CR 310 (factors noted in course of imposing "duty to aid"; result questioned in *Eric J. v Betty M.* (1999) 76 CA4th 715, 728, 90 CR2d 549, which is discussed in §§1.23, 1.26).

NOTE: For a no-longer-citable court of appeal opinion applying *Rowland* factors, see *Kadish v Jewish Community Ctrs. of Greater Los Angeles* (review dismissed Aug. 11, 2004, and remanded to court of appeal; superseded court of appeal opinion at 112 CA4th 711, 5 CR3d 394) (factors applied to exonerate summer camp operator from liability to student shot by outsider).

The *Rowland* factors are not useful, however, in cases in which a plaintiff who was not physically injured seeks damages solely for negligently inflicted emotional distress. *Krupnick v Hartford Acc. & Indem. Co.* (1994) 28 CA4th 185, 198, 34 CR2d 39 (*Rowland* is precedential only in physical injury cases). On liability for negligent infliction of emotional distress, see California Tort Damages §6.24 (2d ed Cal CEB 2002).

Factors that a court will consider when a plaintiff seeks damages from a person not in privity of contract with the plaintiff, for harm alleged to have resulted from the negligent performance of a task for which the plaintiff contracted, are listed in *Bily v Arthur Young & Co.* (1992) 3 C4th 370, 397, 11 CR2d 51:

- The extent to which the transaction was intended to affect the plaintiff;
- The foreseeability of harm to the plaintiff;
- The degree of certainty that the plaintiff suffered injury;
- The closeness of the connection between the defendant's conduct and the injury suffered;
- The moral blame attached to the defendant's conduct;
- The policy of preventing future harm.

See *Weseloh Family Ltd. Partnership v K.L. Wessel Constr. Co.* (2004) 125 CA4th 152, 172, 22 CR3d 660 (engineers that designed retaining wall, employed by subcontractors, owed no duty to property owner or general contractor).

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§1.8 c. Inferring Duty From Affirmative Conduct; Negligent Undertaking Doctrine

One who has begun an affirmative course of conduct that affects the interests of another may be held to have assumed a duty to act with due care and may be liable for negligent acts or omissions; *i.e.,* one who has undertaken an act must do it with care. See *Artiglio v Corning Inc.* (1998) 18 C4th 604, 613, 76 CR2d 479 ("negligent undertaking" theory of liability or "good Samaritan" rule); *Mukthar v Latin Am. Sec. Serv.* (2006) 139 CA4th 284, 289, 42 CR3d 563 (question of fact whether security service's failure to furnish guard increased risk of harm to store clerk hit by customer); *Bloomberg v Interinsurance Exch.* (1984) 162 CA3d 571, 575, 207 CR 853 (auto club could be liable for negligent failure of tow truck driver to find stalled car later hit by drunk). In particular, a person who undertakes to provide protective services to another can be liable for the negligent performance of that undertaking. *Delgado v Trax Bar & Grill* (2005) 36 C4th 224, 249, 30 CR3d 145 (noted in §10.7).

Not every affirmative course of conduct, however, gives rise to liability. See, *e.g., Williams v State* (1983) 34 C3d 18, 27, 192 CR 233 (undertaking to investigate accident does not necessarily require officers to interview witness or pursue other vehicle); *Rotolo v San Jose Sports & Entertainment, LLC* (2007) 151 CA4th 307, 324, 59 CR3d 770 (choosing to have defibrillator at sports facility did not impose duty on owners to tell every facility user of its availability); *Dekens v Underwriters Labs., Inc.* (2003) 107 CA4th 1177, 132 CR2d 699 (testing organization's undertaking was to test appliances for shock hazard, not for asbestos content); *Rose v County of Plumas* (1984) 152 CA3d 999, 199 CR 842 (deputy sheriffs dispatched to scene of bar fight had no duty to aid injured patron without evidence that patron was relying on them for aid). See also *Ursino v Big Boy Restaurants* (1987) 192 CA3d 394, 237 CR 413 (persons who maintain walkways, whether public or private, not required to maintain them in absolutely perfect condition). See §1.24 on police liability when there is a "special relationship" between officers and victim of criminal conduct, and §8.13 on government entity liability for officer's conduct.

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§1.9 d. Court's Role in Determining Duty

The existence of a duty is a question of law for the court. *Kentucky Fried Chicken v Superior Court* (1997) 14 C4th 814, 819, 59 CR2d 756; *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 674, 25 CR2d 137. See *Sharon P. v Arman, Ltd.* (1999) 21 C4th 1181, 1189, 91 CR2d 35, disapproved on other grounds at 25 C4th 854 (noted in §10.7; after summary judgment for defendant, appellate court reviews record de novo to determine whether defendant has conclusively negated a necessary element of plaintiff's case or demonstrated that under no hypothesis is there a material issue of fact that requires trial).

A defendant can defeat a plaintiff's damages claim by convincing a court that, as a matter of law, each of the defendant's particular alleged failures to use ordinary care or skill in the management of his person or property breached no duty owed by that defendant to that plaintiff (or to a class of persons of which the plaintiff was a member). See, *e.g., Huggins v Longs Drug Stores, Inc.* (1993) 6 C4th 124, 133, 24 CR2d 587 (pharmacist who specified erroneous dosage not liable to parents for emotional distress when dosage injured their child); *Delgado v American Multi-Cinema, Inc.* (1999) 72 CA4th 1403, 85 CR2d 838 (theater owner's duty to exclude 13-year-old from violent "R-rated" movie was owed to minor's parents, not to parents of child that minor later shot and killed); *Sanchez v Lindsey Morden Claims Servs., Inc.* (1999) 72 CA4th 249, 84 CR2d 799 (independent claims adjuster hired by insurer owed no duty to insured even if adjuster's alleged negligent failure to promptly adjust claim caused loss to insured); *Quigley v First Church of Christ, Scientist* (1998) 65 CA4th 1027, 76 CR2d 792 (after sick child's father chose to rely on Christian Science treatment, neither grandmother who acquiesced nor Christian Science practitioners had duty to refer child for conventional medical care); *Bryant v Glastetter* (1995) 32 CA4th 770, 778, 38 CR2d 291 (drunk driver stopped by police not liable to tow truck driver hit by another motorist); *Bellah v Greenson* (1978) 81 CA3d 614, 146 CR 535 (psychiatrist not liable to parents of minor patient who committed suicide); *Keene v Wiggins* (1977) 69 CA3d 308, 312, 138 CR 3 (doctor who prepared medical report for insurer not liable for injury resulting from examinee's reliance on negligent misdiagnosis); *Cacciaguidi v Elliott* (1974) 39 CA3d 261, 264, 114 CR 93 (defendant's duty limited by terms of employment contract).

On the other hand, a court can determine, as a matter of law, that a defendant owed a duty of due care to persons in the situation in which the plaintiff was injured, on the basis of such policy considerations as precedent, concepts of morals and justice, convenience, and social judgment as to where the loss should fall. *Weirum v RKO Gen., Inc.* (1975) 15 C3d 40, 46, 123 CR 468, 471. See *Mercado v Leong* (1996) 43 CA4th 317, 327, 50 CR2d 569 (because of mother-child relationship, any negligence that injures fetus breaches duty owed directly to mother).

A judge, before concluding that a particular defendant owed no duty to a particular plaintiff, should (1) begin with the general rule that all persons have a duty to use ordinary care to prevent others from being injured as a result of their conduct, then (2) consider whether "*Rowland* factors" (see §1.7) justify a departure from the general rule. *Ballard v Uribe* (1986) 41 C3d 564, 572, 224 CR 664.

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Source: Torts/California Tort Guide/1 General Principles/§1.10 e. Foreseeability of Risk as Duty Component

§1.10 e. Foreseeability of Risk as Duty Component

Foreseeability of risk (or harm) to the plaintiff is a factor that courts have invoked when deciding whether a defendant owed, and breached, a duty to use due care. See *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 676, 25 CR2d 137 (foreseeability is crucial factor in determining existence and scope of duty; foreseeability of harm is balanced against burden of duty to be imposed). See §10.7 on a premises owner's duty to foresee criminal acts.

Briefly, a court may conclude that a defendant owed a duty because the defendant should have foreseen that his conduct created an unreasonable risk of injury. *Bigbee v Pacific Tel. & Tel. Co.* (1983) 34 C3d 49, 56, 192 CR 857 (phone booth user injured when car hit booth defendant had placed near busy street). That is, a person's general duty to exercise due care includes the duty not to place another person in a situation in which he or she is exposed to an unreasonable risk of harm through a third person's reasonably foreseeable conduct (including reasonably foreseeable negligent conduct). *Lugtu v California Highway Patrol* (2001) 26 C4th 703, 716, 110 CR2d 528 (also noted in §§1.11, 1.18, 4.65, 8.5).

Conversely, the court may conclude that no duty was owed, because the defendant could not reasonably have foreseen that the conduct created a risk of the injury that the plaintiff suffered. See, *e.g., Sharon P. v Arman, Ltd.* (1999) 21 C4th 1181, 1189, 91 CR2d 35, disapproved on other grounds at 25 C4th 854 (noted in §10.7); *Ann M. v Pacific Plaza Shopping Ctr., supra*; *Ludwig v City of San Diego* (1998) 65 CA4th 1105, 1113, 76 CR2d 809 (city traffic engineer could not have foreseen that terminating work after trench had been dug increased risk that trench would collapse next day); *Albert v Southern Pac. Transp. Co.* (1994) 30 CA4th 529, 35 CR2d 777 (railroad company could not have foreseen that work methods would cause employee's heart attack). Further, courts have concluded that the foreseeability component of a legal duty is not satisfied when the defendant's conduct posed no risk of serious harm to a "sufficiently appreciable segment of the general public." See *Friedman v Merck & Co.* (2003) 107 CA4th 454, 461, 131 CR2d 885 (manufacturer of TB test containing animal products owed no duty to "strict ethical vegan" who felt emotional distress).

Courts are inclined to conclude that the *criminal* acts of a third person are not foreseeable absent circumstances such as prior similar criminal acts and thus to rule that a defendant owed no duty to protect the plaintiff against harm resulting from a particular criminal act. See *Wiener v Southcoast Childcare Ctrs., Inc.* (2004) 32 C4th 1138, 1150, 12 CR3d 615 (child care center proprietors had no duty to foresee that vehicle driver bent on killing and injuring children would intentionally drive through weak chain-link fence into playground; *Ann M. v Pacific Plaza Shopping Ctr., supra,* balancing test applied; see §10.7).

In cases in which a plaintiff has sought emotional distress damages absent a physical impact, "the whole duty/foreseeability analysis" has been called inadequate. See *Thing v La Chusa* (1989) 48 C3d 644, 666, 257 CR 865 (car driver not liable to bystander who witnessed injury to loved one). See §1.7 on inapplicability of *Rowland* factors in emotional distress cases. See California Tort Damages, chap 6 (2d ed Cal CEB 2002) on liability for infliction of emotional distress.

Foreseeability is not measured by what is more probable than not; one may be liable for creating the risk of a slight possibility of injury if a reasonably prudent person would not have done so; what is required to be foreseeable is the general character of the event or harm, not its precise nature of manner of occurrence. See *Bigbee v Pacific Tel. & Tel. Co., supra*. The court's task is to evaluate whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm suffered that liability may appropriately be imposed, not to decide whether a *particular* plaintiff's injury was reasonably foreseeable in light of a *particular* defendant's conduct. *Robison v Six Flags Theme Parks, Inc.* (1998) 64 CA4th 1294, 1299, 75 CR2d 838 (plaintiff need not show previous similar incident); see §10.12.

A defendant may be liable for conduct that he should have foreseen created a risk of injury even though (a) another person was the direct cause of injury, (b) the relationship between defendant and plaintiff was remote, and (c) the defendant could not necessarily have foreseen the particular accident or injury resulting from his conduct. *Weirum v RKO Gen., Inc.* (1975) 15 C3d 40, 47, 123 CR 468, 472 (radio station's liability for injury caused by car driver speeding in response to station contest).

Ballard v Uribe (1986) 41 C3d 564, 572, 224 CR 664, suggests that a judge's task, in considering duty, is not to

decide whether a particular plaintiff's injury was reasonably foreseeable in light of a particular defendant's conduct, but rather to evaluate more generally whether the category of negligent conduct at issue is sufficiently likely to result in the kind of harm experienced. The trier of fact would then consider the likelihood or foreseeability of injury in two more focused, fact-specific settings:

- Was the defendant's conduct negligent in the first place?
- Was the defendant's negligence a proximate or legal cause of the injury?

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2. Breach of Duty

§1.11 a. Misfeasance and Nonfeasance

Misfeasance and nonfeasance are two types of breach of the legal duty of care. *Jackson v Ryder Truck Rental, Inc.* (1993) 16 CA4th 1830, 1838, 20 CR2d 913 (owner's failure to maintain truck, which caused breakdown that exposed driver to danger of being hit by another car, was misfeasance).

There is a breach of duty by misfeasance if (1) the defendant failed to use ordinary care in activities from which harm might reasonably be anticipated; (2) the defendant's conduct made the plaintiff's position worse (*i.e.,* defendant created a risk); and (3) the defendant was actively careless. *Jackson v Ryder Truck Rental, Inc., supra*. See *Lugtu v California Highway Patrol* (2001) 26 C4th 703, 716, 110 CR2d 528 (also noted in §§1.10, 1.18, 4.65; misfeasance exists when the defendant is responsible for making the plaintiff's position worse, *i.e.,* defendant has created a risk).

There is a breach of duty by nonfeasance if a defendant (1) has a special relationship to another person and (2) either (a) failed to act affirmatively to prevent that person from harming others or (b) failed to aid that person through beneficial intervention. *Lugtu v California Highway Patrol, supra*; *Jackson v Ryder Truck Rental, Inc., supra*. See §1.23 on duties deriving from special relationships.

A defendant's negligent performance of contractual obligations is a breach of duty that can subject the defendant to tort liability. See *North Am. Chem. Co. v Superior Court* (1997) 59 CA4th 764, 69 CR2d 466 (breach of contract to provide a service; recovery permitted for injury to plaintiff's economic interests without need to prove injury to person or property).

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§1.12 b. Intentional Breach of Duty

A negligence cause of action can sometimes be based on an intentional breach of the duty to use due care; that is, there are situations in which a defendant sued for negligence would not be permitted to escape liability by claiming that the tortious conduct was intentional. See *American Employer's Ins. Co. v Smith* (1980) 105 CA3d 94, 101, 163 CR 649 (after plaintiff alleged negligence, defendant's insurer could not escape coverage by proving that defendant intended to set fires that caused plaintiff's loss). See also *Horace Mann Ins. Co. v Barbara B.* (1993) 4 C4th 1076, 1083, 17 CR2d 210 (defendant's negligent conduct sometimes severable from intentional or criminal conduct). An injury caused by a defendant's intentional act can also sometimes come within an insurance policy's definition of "accident." See *State Farm Fire & Cas. Co. v Superior Court* (Wright) (2008) 164 CA4th 317, 78 CR3d 828 (defendant threw plaintiff in swimming pool to get him wet, but he hit concrete step).

Insurance policies commonly exclude from coverage damages for injury or death caused by acts of the insured that are criminal, intentional, or willful. See, *e.g., Uhrich v State Farm Fire & Cas. Co.* (2003) 109 CA4th 598, 135 CR2d 131 (insurer established that alleged acts were both intentional and intended to cause harm); *Century-National Ins. Co. v Glenn* (2001) 86 CA4th 1392, 104 CR2d 73 (conviction after nolo contendere plea established nonliability under exclusion for criminal or intentional act (firing gun to chase youths from homeowner's backyard)); *20th Century Ins. Co. v Schurtz* (2001) 92 CA4th 1188, 112 CR2d 547 (exclusion for criminal act distinct from exclusion for intentional act). See also *Northland Ins. Co. v Briones* (2000) 81 CA4th 796, 97 CR2d 127 (mobile homeowner's policy that specifically excluded coverage for "physical abuse, sexual abuse, sexual molestation or sexual harassment" distinguishable from teacher's policy in *Horace Mann Ins. Co. v Barbara B., supra*). Such clauses do not, however, necessarily preclude coverage for unintended harm flowing from an intentional act. See *Safeco Ins. Co. v Robert S.* (2001) 26 C4th 758, 763, 110 CR2d 844 (insurer had duty to defend and indemnify homeowner whose son, believing he had taken steps to unload gun, accidentally shot and killed guest, even though policy excluded insured's "illegal act" and son convicted of involuntary manslaughter). An insurer's declaratory relief suit to obtain a determination of noncoverage for an insured's "willful and malicious" acts is not ordinarily subject to a special motion to strike under CCP §425.16 as a strategic lawsuit against public policy (SLAPP suit). *State Farm Gen. Ins. Co. v Majorino* (2002) 99 CA4th 974, 121 CR2d 719.

See generally *Willard v Caterpillar, Inc.* (1995) 40 CA4th 892, 913, 48 CR2d 607 (liability for intentionally caused harm; role of Restatement (Second) of Torts §870 (1979)), disapproved on other grounds in *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 18 n4, 74 CR2d 248.

NOTE: The California Supreme Court has granted the request from the Ninth Circuit Court of Appeals to examine the question "Where a contract of liability insurance covering multiple insureds contains a severability clause, does an exclusion barring coverage for injuries arising out of the intentional acts of 'an insured' bar coverage for claims that one insured negligently failed to prevent to intentional acts of another insured?" *Minkler v Safeco Ins. Co.* (review granted Aug. 12, 2009, S174016) 2009 Cal Lexis 8391 (question of state law certified to the California Supreme Court by the U.S. Court of Appeals for the Ninth Circuit under Cal Rules of Ct 8.548).

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§1.13 c. Engaging in Ultrahazardous Activity

Proof that an injury resulted from a defendant's ultrahazardous activity may excuse the need to prove that the defendant acted negligently. *Garcia v Estate of Norton* (1986) 183 CA3d 413, 228 CR 108 (directed verdict for plaintiff on liability when defendant used blowtorch to modify waste oil tanker, causing explosion).

An activity is ultrahazardous if it necessarily involves a risk of serious harm to another's person that cannot be eliminated by the exercise of the utmost care. *Luthringer v Moore* (1948) 31 C2d 489, 498, 190 P2d 1.

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3. Causation

§1.14 a. Substantial Factor Test

A plaintiff must establish that the defendant's wrongful act was a "proximate," or "legal," cause of the plaintiff's injury by presenting evidence that the defendant's conduct was a *substantial factor* in bringing about harm to the plaintiff. *Mitchell v Gonzales* (1991) 54 C3d 1041, 1052, 1 CR2d 913 (disapproving former BAJI 3.75 and stating that substantial factor test subsumes "but for" test); *Williams v Wraxall* (1995) 33 CA4th 120, 130, 39 CR2d 658 (substantial factor test discussed). See *Rutherford v Owens-Illinois, Inc.* (1997) 16 C4th 953, 969, 67 CR2d 16 (substantial factor standard subsumes "but for" test and reaches beyond it to cover cases involving independent or concurrent causes). See also *Viner v Sweet* (2003) 30 C4th 1232, 1243, 135 CR2d 629 ("but for" instruction should have been given in transactional legal malpractice case); *Lazy Acres Mkt., Inc. v Tseng* (2007) 152 CA4th 1431, 1436, 62 CR3d 378 (need to prove that but for negligence of attorney better result would have been obtained in underlying suit); Restatement (Second) of Torts §§430-431 (1965). For a causation instruction, see CACI 430 (2003, amended October 2004). See also BAJI 3.76 (9th ed 2002).

A very minor force that causes harm can be a substantial factor. *Bockrath v Aldrich Chem. Co.* (1999) 21 C4th 71, 78, 86 CR2d 846 (also noted in §§1.16, 11.20). A defendant's conduct is a substantial factor in bringing about harm if it has created a force (or series of forces) that are in continuous and active operation up to the time of the harm. *Osborn v Irwin Mem. Blood Bank* (1992) 5 CA4th 234, 253, 7 CR2d 101. See *Espinosa v Little Co. of Mary Hosp.* (1995) 31 CA4th 1304, 1313, 37 CR2d 541 (agreeing with BAJI Committee's Comment to BAJI 3.76, which characterizes "substantial factor," for causation purposes, as something more than a slight, trivial, negligible, or theoretical factor).

A defendant's conduct, however negligent or tortious, is not a substantial factor in bringing about harm to the plaintiff if the harm would have been sustained even if the defendant had not been negligent, unless the defendant's conduct operates with another force and each, of itself, would have been sufficient to bring about harm. *Williams v Wraxall, supra,* quoting *Bromme v Pavitt* (1992) 5 CA4th 1487, 1498, 7 CR2d 608. See §1.17 on concurring causes.

NOTE: On establishing causation in mass toxic tort cases, see *In re Hanford Nuclear Reservation Lit.* (Jaros v E.I. Dupont de Nemours & Co.) (9th Cir 2002) 292 F3d 1124, 1134 (to establish causation, each plaintiff must show that proven radiation levels were capable of causing his or her disease and in fact did so).

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§1.15 b. Defining "Proximate" or "Legal" Cause

Proximate cause involves two elements: (1) cause in fact (whether the defendant's act was a necessary antecedent of an event), and (2) policy considerations that limit a defendant's legal responsibility for the consequences of his or her conduct. *PPG Indus., Inc. v Transamerica Ins. Co.* (1999) 20 C4th 310, 315, 84 CR2d 455 (insurance company's refusal to settle was cause in fact, but not proximate cause, of punitive damages award against insured). That is, "proximate" or "legal" cause has two basic components: (1) causation in fact, which asks whether the defendant's negligent conduct was a substantial factor in bringing about the plaintiff's injury (or was a necessary antecedent to the injury); and (2) the "normative or evaluative element," or policy considerations, which asks whether the defendant *should* be held responsible for negligently causing the injury, limiting responsibility to causes that are so closely connected with the result, and of such significance, that the law is justified in imposing liability. *Jackson v Ryder Truck Rental, Inc.* (1993) 16 CA4th 1830, 1846, 20 CR2d 913 (owner's failure to maintain rental truck, causing it to stall on highway, was substantial factor in exposing driver to danger of being hit by passing car).

Causation in fact is a question of fact (see §1.16 on proving causation), while it is a question of law whether policy considerations should limit a defendant's liability. See *Evan F. v Hughson United Methodist Church* (1992) 8 CA4th 828, 835, 10 CR2d 748, 753 (church could be liable to boy allegedly molested by negligently hired pastor but not to boy's sister who was later molested by the boy).

NOTE: In some opinions, "proximate cause" is used to encompass both the cause in fact element and the evaluative element of legal causation. In other opinions, "proximate cause" has been used to distinguish the evaluative element from the cause in fact element, calling the latter "actual cause." Thus, a court may (1) concede that reasonable jurors could find that a defendant's conduct was an actual cause of a plaintiff's injury, but (2) dismiss the suit on the ground that the conduct was not a proximate cause. See *Bohrer v County of San Diego* (1980) 104 CA3d 155, 163, 163 CR 419 (question of proximate cause should not be confused with the question of duty; proximate cause is normally question of fact); *Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 509, 124 CR 467 (in some cases, court determination that alleged cause was not "proximate" or "legal" cause is not question of causation but policy determination that defendant should not be held liable).

"Efficient proximate cause" is a term used in determining whether the insured's loss was covered by the policy. Thus, an insurer may be liable to the insured for a loss the immediate cause of which is excluded from coverage (*e.g.,* damage to property inside a building caused by rain) when there is coverage for the efficient proximate cause (*e.g.,* failure of the contractor repairing the roof to cover an opening before the rain began). See *Tento Int'l, Inc. v State Farm Fire & Cas. Co.* (9th Cir 2000) 222 F3d 660.

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§1.16 c. Proving Causation

A plaintiff usually has the burden of establishing by direct or circumstantial evidence that it is more probable than not that the defendant's conduct was a cause of the injury. *Valdez v J.D. Diffenbaugh Co.* (1975) 51 CA3d 494, 509, 124 CR 467. However, if a defendant's failure to comply with a statute or safety regulation has deprived the plaintiff of a means of establishing the cause of the injury, the burden may shift to the defendant to negate causation. See *Haft v Lone Palm Hotel* (1970) 3 C3d 756, 771, 91 CR 745 (failure to provide lifeguard). Similarly, the burden of negating causation shifts to a defendant who was in a better position to discover and preserve the evidence that would show whether the defendant's established negligence was a cause of the plaintiff's injury or loss. *Harris v Irish Truck Lines, Inc.* (1974) 11 C3d 373, 380, 113 CR 489 (claim that brake failure caused truck collision); *Galanek v Wismar* (1999) 68 CA4th 1417, 81 CR2d 236 (attorney negligently failed to preserve product liability evidence); *Thomas v Lusk* (1994) 27 CA4th 1709, 1717, 34 CR2d 265 (same). See §1.3 on restrictions on liability for failing to preserve evidence.

Standards for pleading and proving causation when harm was caused by exposure to multiple toxic substances are set out in *Bockrath v Aldrich Chem. Co.* (1999) 21 C4th 71, 78, 86 CR2d 846 (also noted in §§1.14, 11.20). In suits against the suppliers of asbestos products, it is error to shift to each defendant the burden of proving that its product was not a legal cause of the plaintiff's injury. See *Rutherford v Owens-Illinois, Inc.* (1997) 16 C4th 953, 968, 67 CR2d 16 (also noted in §§1.14, 11.20, 11.46). See also *Kennedy v Southern Cal. Edison Co.* (9th Cir 2001) 268 F3d 763, 769 (in asbestos-related cancer cases, *Rutherford* requires showing that product "in reasonable medical probability" was substantial factor in risk of developing disease).

Whether an act or omission was an actual cause of an accident or injury is usually a question of fact to be decided by the trier of fact. *Hoyem v Manhattan Beach City Sch. Dist.* (1978) 22 C3d 508, 520, 150 CR 1. A conclusion that exposure to a substance was the cause of a subsequent condition can be based on expert medical and scientific testimony. See *Roberti v Andy's Termite & Pest Control, Inc.* (2003) 113 CA4th 893, 6 CR3d 827 (trial court erred when it excluded testimony by toxicologists and medical doctors that pre- and postnatal exposure to particular pesticide used to fumigate house caused autism; admissibility test in *People v Kelly* (1976) 17 C3d 24, 130 CR 144, inapplicable under circumstances; "*Daubert* test" not applicable in California state courts). But see *Geffcken v D'Andrea* (2006) 137 CA4th 1298, 41 CR3d 80 (no error in exclusion of expert testimony offered to support allegations that mold in house and workplace caused injury; evidence did not pass *Kelly-Frye* test).

NOTE: Expert scientific testimony on the cause of a particular harm, when required in a federal lawsuit, must meet the test for admissibility adopted in *Daubert v Merrell Dow Pharm., Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786 (discussed in §§9.31, 11.8, 11.20). See *Clausen v M/V New Carissa* (9th Cir 2003) 339 F3d 1049, 1055 (verdict supported by testimony that oil from wrecked freighter destroyed commercial oyster bed). For more on the *Daubert* test, see §§9.32, 11.8, 11.20.

There are situations, however, in which a court can decide an actual causation question as a matter of law. See, *e.g., Ochoa v PG&E* (1998) 61 CA4th 1480, 72 CR2d 232 (unrebutted experts' declarations that leaking gas could not have caused house occupant's respiratory symptoms justified summary judgment); *Skinner v Vacaville Unified Sch. Dist.* (1995) 37 CA4th 31, 42, 43 CR2d 384 (no reasonable jury could have inferred that defendant's conduct was substantial factor in causing plaintiff's injury); *Noble v Los Angeles Dodgers, Inc.* (1985) 168 CA3d 912, 214 CR 395, disapproved on other grounds at 8 C4th 580 (plaintiff assaulted by two drunks in stadium parking lot failed to prove that defendant's failure to act more carefully had any causal connection with plaintiff's injuries); *Elder v Pacific Tel. & Tel. Co.* (1977) 66 CA3d 650, 657, 136 CR 203 (nonsuit when evidence showed plaintiff's conduct to be "sole proximate cause" of his injuries). See also *Kohler v Aspen Airways, Inc.* (1985) 171 CA3d 1193, 1203, 214 CR 720 (record devoid of evidence that prudent person would have refused to take flight had warning of possible air turbulence been provided).

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§1.17 d. Concurring Cause; Alternative Cause

A plaintiff need not prove that a defendant's negligence was the sole cause of an injury; it is enough that defendant's negligence is *a* legal cause, even if it operated in combination with other causes, tortious or not. *Logacz v Brea Community Hosp.* (1999) 71 CA4th 1149, 1160, 84 CR2d 257 (error not to instruct jury in terms of BAJI 3.77 (9th ed 2002); see CACI 431 (2003)).

If several causes concur to bring about an event or injury, a defendant whose fault was a substantial factor and a material element in bringing it about is liable even though the identical harm might have occurred without the defendant's fault. *Vecchione v Carlin* (1980) 111 CA3d 351, 359, 168 CR 571. See *Bloomberg v Interinsurance Exch.* (1984) 162 CA3d 571, 576, 207 CR 853 (anyone responsible for accident victim's being in exposed position could be found to have substantially contributed to cause of accident).

A plaintiff who proves that his or her injury must have been caused by at least one of two or more tortfeasors is relieved of the burden of proving that a particular defendant's fault caused the injury; the burden shifts to each defendant to prove that his or her conduct was not the cause of the injury. *Vahey v Sacia* (1981) 126 CA3d 171, 174, 178 CR 559. See *Summers v Tice* (1948) 33 C2d 80, 199 P2d 1. But see *Vecchione v Carlin* (1980) 111 CA3d 351, 360, 168 CR 571 (no shift when possible cause of injury was factor other than either defendant's conduct).

See §§11.20-11.22 on concurring and alternate causes in product liability cases.

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Source: Torts/California Tort Guide/1 General Principles/§1.18 e. Superseding Cause

§1.18 e. Superseding Cause

A superseding cause is an act or a force that (1) is independent from a defendant's negligence and (2) intervenes between the defendant's negligence and the injury. It breaks the chain of causation and relieves the original actor from liability. *Schrimsher v Bryson* (1976) 58 CA3d 660, 664, 130 CR 125. See Restatement (Second) of Torts §§440-442 (1965). See also *Brewer v Teano* (1995) 40 CA4th 1024, 1030, 47 CR2d 348 (district attorney's decision to prosecute driver for leaving scene of accident was superseding cause that insulated from liability person whose threatening conduct induced driver to leave).

Another person's intervening negligence cuts off a negligent defendant's liability (*i.e.,* is a superseding cause) if (1) the defendant could have foreseen neither the intervening conduct nor the result it caused (see *Hoyem v Manhattan Beach City Sch. Dist.* (1978) 22 C3d 508, 521, 150 CR 1), or (2) a reasonable person would view the intervening conduct as "highly extraordinary," or (3) the intervening conduct was extraordinarily negligent and not a normal consequence of the situation that the defendant created. *Martinez v Vintage Petroleum, Inc.* (1998) 68 CA4th 695, 701, 80 CR2d 449 (negligent failure to depressurize natural gas pipe superseded by negligence of workers employed to cut the pipe).

When a defendant's liability is based on having negligently exposed the plaintiff to an unreasonable risk of harm from others' conduct, the occurrence of such conduct cannot constitute a superseding cause. See *Lugtu v California Highway Patrol* (2001) 26 C4th 703, 716, 110 CR2d 528 (CHP officer could be liable to driver he directed to stop on median strip, where driver was hit by another vehicle; also noted in §§1.10, 1.11, 4.65).

The negligence of a third person that is the immediate cause of the injury may be viewed as a superseding cause only if the negligence is so highly extraordinary as to be unforeseeable, and whether that is so is ordinarily a question of fact. *Torres v Xomox Corp.* (1996) 49 CA4th 1, 18, 56 CR2d 455 (user's modification of valve did not absolve manufacturer from liability for defective design). See *Springmeyer v Ford Motor Co.* (1998) 60 CA4th 1541, 1555, 71 CR2d 190 (buyer's failure to respond to product recall not so unusual as to constitute superseding cause as a matter of law). That is, an act must have been more than merely a subsequent act in a chain of causation. It must not have been reasonably foreseeable at the time of the defendant's negligent conduct. *Anaya v Superior Court* (2000) 78 CA4th 971, 973, 93 CR2d 228 (driver whose alleged negligence caused vehicle collision in which passenger was injured liable for death of passenger in later crash of helicopter taking her to medical facility; foreseeable that causing injury will subject person to further injury during treatment or transportation to it; superseding cause not inferable from allegations that helicopter was negligently maintained or was defective product). Even if the intervening act is negligent, it is not a superseding cause if the first actor should have known that a third person might so act. *USAir, Inc. v United States Dep't of Navy* (9th Cir 1994) 14 F3d 1410 (flight attendant's failure to use utmost care while opening overhead storage bin does not exonerate passenger who negligently placed briefcase in bin).

That an independent intervening act is negligent does not necessarily make it a superseding cause; the original actor remains concurrently liable if a reasonable person would not regard it as highly extraordinary that the intervening actor so acted, or if the act is a normal response to a situation created by the defendant's conduct. *Stewart v Cox* (1961) 55 C2d 857, 863, 13 CR 521 (third person's failure to protect plaintiff from harm is not superseding cause). See also *Sanders v Atchison, T. & S.F. Ry.* (1977) 65 CA3d 630, 649, 135 CR 555; *Fish v Los Angeles Dodgers Baseball Club* (1976) 56 CA3d 620, 634, 128 CR 807. See Restatement §§442-453.

In other words, a tortfeasor is relieved of liability by an independent intervening act "only if the intervening act is highly unusual or extraordinary," *i.e.,* not reasonably foreseeable. *Hart v Browne* (1980) 103 CA3d 947, 964, 163 CR 356. See also *Jackson v Ryder Truck Rental, Inc.* (1993) 16 CA4th 1830, 1846, 20 CR2d 913 (rental truck owner's failure to maintain it put lessee in position to be hit by passing motorist who may have been asleep at wheel); *Bloomberg v Interinsurance Exch.* (1984) 162 CA3d 571, 576, 207 CR 853 (question of fact whether tow truck driver who negligently failed to find caller's stalled car should have foreseen that car might be hit by drunk driver); *Bunton v Arizona Pac. Tanklines* (1983) 141 CA3d 210, 221, 190 CR 295 (when faulty maintenance of trailer brakes caused trailer to swerve into plaintiff's car, act that occasioned use of brakes—third person's wrong-way entry onto freeway—was not intervening cause); *Bigbee v Superior Court* (1979) 93 CA3d 451, 155 CR 545 (question for jury whether

negligent siting and design of telephone booth was concurrent cause or whether driver's negligence in hitting booth, thus injuring plaintiff, was independent intervening act that relieved telephone company from liability).

Further, a defendant is relieved of liability by an intervening act only if neither the intervening conduct nor the type of injury was foreseeable by the defendant. *Pappert v San Diego Gas & Elec. Co.* (1982) 137 CA3d 205, 210, 186 CR 847. But see *Whitton v State* (1979) 98 CA3d 235, 243, 159 CR 405 (mathematically computable possibility that drunk driver might hit car pulled off road by CHP officers is not "reasonable foreseeability" that such an accident might occur).

In a vehicle collision, a negligent driver (*e.g.,* one making an unsafe left turn) is absolved of liability by the negligence of the other driver (*e.g.,* speeding) only if the other driver's negligence can be said to have been the sole proximate cause of the collision to the entire exclusion of the first driver's fault; otherwise, their fault is concurrent. *Hardison v Bushnell* (1993) 18 CA4th 22, 28, 22 CR2d 106 (also ruled out as superseding causes: blowing dust that restricted visibility, nonuse of seat belt, intoxication of injured person who was passenger in other vehicle).

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§1.19 4. Injury

The recovery of damages may be denied in a negligence lawsuit on the ground that the loss or harm claimed by the plaintiff is not "an injury cognizable at law." See *Turpin v Sortini* (1982) 31 C3d 220, 234, 182 CR 337 (child with congenital defect who would not have been born but for defendant's negligence cannot recover damages for pain and suffering or other general damages). See also *Perry v Atkinson* (1987) 195 CA3d 14, 240 CR 402 (noted in §1.2); *Koepke v Loo* (1993) 18 CA4th 1444, 23 CR2d 34 (need to show actual loss or damage; see discussion in §1.26).

For further discussion of "injury cognizable at law," see *Curlender v Bio-Science Labs.* (1980) 106 CA3d 811, 828, 165 CR 477, the result in which was partially disapproved in *Turpin v Sortini, supra*.

For a defendant's negligent performance of contractual obligations, a plaintiff may recover tort damages for injury to plaintiff's economic interests without needing to prove injury to person or property. See *North Am. Chem. Co. v Superior Court* (1997) 59 CA4th 764, 69 CR2d 466 (breach of contract to provide a service).

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C. Special Standards and Duties

§1.20 1. Minors

A young child is not normally held to adult standards of conduct but must use that degree of care ordinarily exercised by children of like age, intelligence, and experience. *Cummings v County of Los Angeles* (1961) 56 C2d 258, 263, 14 CR 668, 671; *Olsen v McGillicuddy* (1971) 15 CA3d 897, 903, 93 CR 530. See Restatement (Second) of Torts §283A (1965). However, a child is held to an adult standard when engaged in an adult activity such as driving an automobile. See §4.2. See also §1.42 on rule that child under age five cannot be contributorily negligent.

Just as young children are not held to adult standards of conduct, adults must use greater caution for the protection and safety of young children than for adults with normal physical and mental faculties. See *Schwartz v Helms Bakery Ltd.* (1967) 67 C2d 232, 240, 60 CR 510, 515; *Calandri v Ione Unified Sch. Dist.* (1963) 219 CA2d 542, 547, 33 CR 333, 335 (error not to instruct on this duty).

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§1.21 2. Disabled Persons

A person whose faculties are impaired by a physical disability (*e.g.,* blindness, age, feebleness) must use that care which a person of ordinary prudence with similarly impaired faculties would use in the same circumstances. See *Conjorsky v Murray* (1955) 135 CA2d 478, 482, 287 P2d 505, 508; Restatement (Second) of Torts §283C (1965). A mentally deficient adult, however, may be liable for conduct that does not conform to the reasonable care standard. See *Fox v City & County of San Francisco* (1975) 47 CA3d 164, 169, 120 CR 779; Restatement §283B. See also §4.2 and discussion in §4.8 of *Bashi v Wodarz* (1996) 45 CA4th 1314, 1323, 53 CR2d 635 (sudden, unexpected onset of mental illness).

A person with a known handicap may have to exercise greater care for his or her own safety in particular situations than would other persons. See *Scott v Alpha Beta Co.* (1980) 104 CA3d 305, 310, 163 CR 544 (in slip-and-fall case, plaintiff's obesity, "trick knee," and left leg weakness all relevant on contributory fault as well as proximate cause). But see the suggestion in *Fox v City & County of San Francisco, supra,* and Restatement §464, Caveat and Comment g, that insanity and physical disability, but not mental deficiency, lower the standard of care that a plaintiff must use for his or her own safety.

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§1.22 3. Occupational Standards; Professionals; Specialists

Defendants engaged in certain business activities may be held to a stricter statutory standard of care than the CC §1714(a) requirement to use ordinary care and skill in managing their persons and property. See, *e.g.,* §5.6 (utmost care and skill required of carriers of persons for reward).

Specific definitions of the standard of care apply to persons engaged in certain "professional" occupations. For example, an attorney at law doing legal work for a client has a duty to possess the degree of learning and skill, and to use the care, skill, and diligence ordinarily possessed and used, by reputable attorneys in similar circumstances. See *Kirsch v Duryea* (1978) 21 C3d 303, 308, 146 CR 218; *Williams v Wraxall* (1995) 33 CA4th 120, 130, 39 CR2d 658. See also *Wiley v County of San Diego* (1998) 19 C4th 532, 536, 79 CR2d 672 (elements of causes of action for legal malpractice). See §9.1 on the standard of care applicable to physicians and other health care providers.

A person who claims to be a specialist within a profession has a duty to possess and use the knowledge, care, and skill ordinarily possessed and used by other reputable specialists in similar circumstances. *Wright v Williams* (1975) 47 CA3d 802, 810, 121 CR 194. See §9.2 on medical specialists.

That a professional may have committed professional negligence (malpractice) by failing to meet the applicable standard does not prevent a court from ruling, on the basis of *Rowland* factors (see §1.7), or because there was no professional relationship between them, that the defendant owed no professional duty to the injured person. See, *e.g., Williams v Wraxall, supra*; *Keene v Wiggins* (1977) 69 CA3d 308, 312, 138 CR 3. See §9.69 on the plaintiff's need to show that a physician-patient relationship existed with the defendant. In such cases, added to the *Rowland* factors may be "the extent to which the transaction was intended to affect the plaintiff." Because a professional standard does not apply does not necessarily mean that the defendant may not be liable for lack of *ordinary* care and skill. See §1.4.

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§1.23 D. Liability for Conduct of Third Persons; Special Relationships

One person owes no duty to another person to control the conduct of a third person, nor to warn another who is endangered by the third person's conduct, *unless* (1) a special relationship exists between the first person and the third person that imposes on the former a duty to control the latter, or (2) a special relationship exists between the first person and the endangered person that imposes on the former a duty to protect the latter. *Peterson v San Francisco Community College Dist.* (1984) 36 C3d 799, 806, 205 CR 842 (duty to protect students from criminal attacks; see §§1.29, 8.29, 10.7); Restatement Second of Torts (1965) §315. See *Hoff v Vacaville Unified Sch. Dist.* (1998) 19 C4th 925, 933, 80 CR2d 811 (noted in §§1.29, 8.5; school had responsibility for off-campus injury caused by student's driving despite common law reluctance to impose liability for nonfeasance). See also *Juarez v Boy Scouts of Am., Inc.* (2000) 81 CA4th 377, 411, 95 CR2d 786 (special relationship existed between Boy Scouts and troop member giving rise to duty to protect him from harm caused by criminal conduct of adult volunteers); *Klein v BIA Hotel Corp.* (1996) 41 CA4th 1133, 1141, 49 CR2d 60 ("residential hotel facility for the elderly" had special relationship with, and duty to monitor health and well-being of, resident who jumped or fell from roof; see also §9.61); *Phyllis P. v Superior Court* (1986) 183 CA3d 1193, 228 CR 776 (school district had special relationship with mother of raped girl, creating duty to warn mother that girl was being molested). A duty to protect an endangered person may also be imposed by statute. See *Alejo v City of Alhambra* (1999) 75 CA4th 1180, 89 CR2d 768 (noted in §8.9).

On the other hand, as a general rule, one has no duty to come to the aid of another. *Williams v State* (1983) 34 C3d 18, 23, 192 CR 233 (noted in §1.8); *Williams v Southern Cal. Gas Co.* (2009) 176 CA4th 591, 98 CR3d 258 (noted in §7.1). A person is not responsible for mere inaction absent a special relationship that creates a duty to take action; the law does not require people to be good Samaritans. *Eric J. v Betty M.* (1999) 76 CA4th 715, 90 CR2d 549 (noted in §1.25; no duty to warn third person of son's and brother's dangerous propensities). See also *Lopez v Baca* (2002) 98 CA4th 1008, 120 CR2d 281 (nightclub owner had no duty to provide enough security to prevent one patron from being shot by another when shooting not foreseeable).

In deciding whether a special relationship exists, and thus a duty of care, courts consider the *Rowland* factors listed in §1.7. *Davidson v City of Westminster* (1982) 32 C3d 197, 203, 185 CR 252; *Titus v Canyon Lake Prop. Owners Ass'n* (2004) 118 CA4th 906, 911, 13 CR3d 807 (insufficient special relationship between property owners association (or security firm it employed) and resident to support liability to one killed when car driven by intoxicated resident hit tree; also noted in §10.7); *Hernandez v KWPH Enters.* (2004) 116 CA4th 170, 10 CR3d 137 (insufficient special relationship between ambulance EMTs and mentally disturbed person they were transporting to impose on them a duty to prevent her from exiting ambulance and running into traffic).

See §10.7 on a premises owner's liability for injuries caused by the criminal acts of others.

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§1.24 1. Law Enforcement Personnel

Generally, the police and other governmental law enforcement personnel have not been held liable for harm resulting from the conduct of third persons not under their direct control. See *Zelig v County of Los Angeles* (2002) 27 C4th 1112, 1130, 119 CR2d 709 (county had not such special relationship to litigants in family law matter to be liable for not preventing one from shooting another in courthouse); *Davidson v City of Westminster* (1982) 32 C3d 197, 203, 185 CR 252 (police officers on surveillance outside laundromat had no special relationship either with stabbing victim, who did not know police were there and who was not relying on them for protection, nor with assailant, who resembled perpetrator of similar attack at that place on previous evening); *Benavidez v San Jose Police Dep't* (1999) 71 CA4th 853, 866, 84 CR2d 157 (that police had responded to earlier attack on plaintiff by boyfriend did not create special relationship to her that would make officers liable for injury from attack after they left); *Adams v City of Fremont* (1998) 68 CA4th 243, 281, 80 CR2d 196 (police had no special relationship with armed man threatening suicide); *Brenneman v State* (1989) 208 CA3d 812, 256 CR 363 (state has no general duty to supervise or otherwise control paroled child molester or to warn children or parents of neighborhood in which he lives of danger he poses); *Lehto v City of Oxnard* (1985) 171 CA3d 285, 217 CR 450 (police not liable for releasing drunk driver who thereafter had accident). See also *Falls v Superior Court* (1996) 42 CA4th 1031, 49 CR2d 908 (although deputy district attorneys may have had special relationship with witness who testified against gang members, they had quasi-judicial immunity from liability for failing to protect him against gang reprisal). But see *Doggett v U.S.* (9th Cir 1988) 875 F2d 684, 689 (security guard at naval base could be liable for letting intoxicated sailor drive away from base).

Private (nongovernmental) security personnel can be held liable for negligent failure to prevent criminal attacks. See *Mukthar v Latin Am. Sec. Serv.* (2006) 139 CA4th 284, 289, 42 CR3d 563 (question of fact whether security service's failure to furnish guard increased risk of harm to store clerk hit by customer); *Marois v Royal Investigation & Patrol, Inc.* (1984) 162 CA3d 193, 199, 208 CR 384 (security guards hired by business to provide security services had special relationship to its customers). But see *Elizarraras v L.A. Private Sec. Servs.* (2003) 108 CA4th 237, 133 CR2d 302 (security guards who did not serve alcohol to minors at party not liable for injury to them after they drove away; see §4.63). See also *Trujillo v G.A. Enters.* (1995) 36 CA4th 1105, 1108, 43 CR2d 36 (question for jury whether fast food restaurant liable for its security guard's failure to protect plaintiff from assault). See §10.7 on property owner's liability.

For discussion of public entity and employee liability, see §8.13. On a landowner's liability for others' criminal conduct, see §§10.6-10.11, 10.38.

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§1.25 2. Health Care Providers

A care provider's special relationship with a patient or client may provide a basis for liability for failing to prevent a patient or care facility inmate from harming himself or others. See *Bragg v Valdez* (2003) 111 CA4th 421, 3 CR3d 804 (treating psychiatrist who releases patient because patient not covered by insurance can be liable for injury patient causes to self or others); *Myers v Quesenberry* (1983) 144 CA3d 888, 193 CR 733 (doctors' potential liability for failing to warn patient with uncontrolled diabetic condition not to drive). See also *Mast v Magpusao* (1986) 180 CA3d 775, 225 CR 689 (nursing-home duty to protect patient from assault by another patient). For further discussion, see §9.10.

Cases in which it was concluded that no duty was owed or breached include *J.L. v Children's Inst., Inc.* (2009) 177 CA4th 388, 99 CR3d 5 (nonprofit corporation not liable for assault on child that it referred to family daycare home); *Rice v Center Point, Inc.* (2007) 154 CA4th 949, 65 CR3d 312 (private residential substance abuse treatment facility operators not liable to victims of inmates who escaped); *Buenavista v City & County of San Francisco* (1989) 207 CA3d 1168, 255 CR 329 (city hospital not liable for injuries caused by escaped psychiatric patient); *Beauchene v Synanon Found.* (1979) 88 CA3d 342, 347, 151 CR 796 (private rehabilitation program for released convicts not liable for assaults by person released to program).

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§1.26 3. Family Members; Friends

Parents' and Guardians' Statutory Liability. Parents or guardians are statutorily liable, up to specified sums, for injury to person or property or death caused by a minor's willful misconduct (CC §1714.1) and for injury or death caused by the minor's discharge of a firearm (CC §1714.3). See *Curry v Superior Court* (1993) 20 CA4th 180, 24 CR2d 495 (under §1714.1, minor's cotortfeasors may recover comparative indemnity from his parents).

Nonstatutory Liability. A person may be liable for failing to control a family member's conduct or failing to warn or protect a potential victim. See *Pamela L. v Farmer* (1980) 112 CA3d 206, 169 CR 282 (wife who invited neighborhood children to swim in pool could be liable for battery on them by husband whom she knew had history of molesting women and children); *Megeff v Doland* (1981) 123 CA3d 251, 257, 176 CR 467 (alleged failure of wife and daughter to control violent octogenarian). See Restatement (Second) of Torts §§315-320 (1965). See Annos, 118 ALR5th 513 (2004) (liability for minor's willful or malicious act), 25 ALR5th 1 (1994) (family members' liability for physical assaults by adults). But see *Chaney v Superior Court* (1995) 39 CA4th 152, 46 CR2d 73 (although wife may be liable for failing to protect child guest in home from sexual assault by husband, extended "sexual abuse" statute of limitations—see Note in §1.23—does not apply to nonabusing wife).

Cases that have rejected family member liability include *Eric J. v Betty M.* (1999) 76 CA4th 715, 90 CR2d 549 (parents and brothers of person on parole from conviction for child molestation not liable for failing to warn parolee's new girlfriend when parolee molested her 8-year-old son); *Todd v Dow* (1993) 19 CA4th 253, 23 CR2d 490 (parents whose adult son accidentally shot his cousin had no duty to control his conduct or to warn the cousin); *Koepke v Loo* (1993) 18 CA4th 1444, 23 CR2d 34 (neither defendant's relationship with the man who was her former lover, nor with his new inamorata, was sufficient to create duty to protect latter from former); *Hansra v Superior Court* (1992) 7 CA4th 630, 9 CR2d 216 (mother and brother of man who shot his wife had no ability to control him); *Rubio v Swiridoff* (1985) 165 CA3d 400, 211 CR 338 (man had no special relationship with, nor control over, "girlfriend" who, after quarrel, pursued him at high speed, striking decedent's vehicle); *Ronald M. v White* (1980) 112 CA3d 473, 169 CR 370 (minor passenger had no duty to control conduct of minor driver).

Persons who offer "substantial encouragement" to a drunk driver may be liable to the driver's injured victim for their "concerted action" under a conspiracy theory. See *Cully v Bianca* (1986) 186 CA3d 1172, 231 CR 279.

Parents of a friend of both a minor assaulter and his minor victim are not liable to the victim if the parents' alleged fault is no more than the nonfeasance of leaving the minors without adult supervision. See *Romero v Superior Court (Ryan N.)* (2001) 89 CA4th 1068, 1078, 107 CR2d 801 (no showing that parents were aware of any danger that their son's visiting friend might assault another visitor while parents went to buy pizza). Similarly, although a parent who left her 13-year-old daughter at home can be said to have had a special relationship with the daughter's friend who came to the house after the parent had left, the parent could not have foreseen that the friend would be raped after she left the house. See *Margaret W. v Kelley R.* (2006) 139 CA4th 141, 42 CR3d 519 (parent had not voluntarily undertaken the protection of the friend; see §1.8).

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§1.27 4. Employers

Under the respondeat superior principle, an employer (or principal) is vicariously liable for injury caused by an employee's (or agent's) negligent or tortious conduct while acting within the scope of the employment. See CC §2338. Whether an employee was acting within the scope of employment is sometimes a question of fact. See *Yamaguchi v Harnsmut* (2003) 106 CA4th 472, 130 CR2d 706 (error for trial judge to decide, as matter of law, that restaurant employee who threw hot grease at police officer who was trying to break up fight between employees was so acting). See also §§4.45-4.62 on employers' liability for injuries resulting from employees' driving. An employer is not vicariously liable for harm caused by an employee who has substantially deviated from employment duties for personal purposes. *Hoblitzell v City of Ione* (2003) 110 CA4th 675, 2 CR3d 8 (city building inspector stepped outside scope of employment when, as favor to friend, he harassed a builder outside city).

NOTE: Employers have avoided respondeat superior liability by convincing courts that employee conduct that was criminal should be deemed to be outside the scope of the employment. See, *e.g., Maria D. v Westec Residential Sec., Inc.* (2000) 85 CA4th 125, 102 CR2d 326 (security guard's employer not liable for sexual assault); *Borg-Warner Protective Servs. Corp. v Superior Court* (1999) 75 CA4th 1203, 89 CR2d 687 (employer not liable for loss caused by security guard's arson). But see *Inter Mt. Mortgage, Inc. v Sulimen* (2000) 78 CA4th 1434, 1442, 93 CR2d 790 (employer liable when nexus established between employment and alleged fraudulent loan scheme). See cases in §1.30 on religious organization liability for clergy conduct. But see §8.13 on public entity liability for the criminal conduct of law enforcement officers. Employers have also avoided respondeat superior liability by arguing that the tortfeasor was a volunteer, not an employee. See *Munoz v City of Palmdale* (1999) 75 CA4th 367, 89 CR2d 229 (unpaid worker at city-run "senior center").

Separate from respondeat superior liability, an employer may be liable under Restatement (Second) of Agency §213 for harm caused by an employee whom the employer hired or retained with actual or constructive knowledge that the employee's retention created, in light of the work, an undue risk of harm to others. See *Federico v Superior Court* (1997) 59 CA4th 1207, 1213, 69 CR2d 370, in which, however, the court granted summary judgment to an employer that had hired a former convict who, years later, sexually molested another employee's child. See also *Phillips v TLC Plumbing, Inc.* (2009) 172 CA4th 1133, 91 CR3d 864 (employer that hired ex-convict not liable 2 years after firing him to heirs of customer he had killed; negligent hiring and retention too remote from injury). See §6.10 on liability for negligently hiring an independent contractor whose legal fault causes injury.

An employer may be liable for failing to warn an employee of a coemployee's propensities. See *Duffy v City of Oceanside* (1986) 179 CA3d 666, 224 CR 879 (employer failed to warn female employee that male coemployee was convicted rapist). But see *Vu v Singer Co.* (9th Cir 1983) 706 F2d 1027 (operator of Job Corps Center had no duty to warn neighbors of dangerous propensities of corps members).

Similarly, an employer who writes a recommendation letter for a former employee may be liable if the letter misrepresents the qualifications or character of the former employee in a way that creates a substantial, foreseeable risk of physical injury to a prospective employer or others. See *Randi W. v Muroc Joint Unified Sch. Dist.* (1997) 14 C4th 1066, 1081, 60 CR2d 263 (noted in §§1.29, 8.5 and 8.9). See Anno, 68 ALR5th 1 (1999) (liability for misrepresentation or nondisclosure in employment reference).

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§1.28 5. Businesses; Suppliers of Dangerous Chattels

The special relationship between a business establishment and its customers may place an affirmative duty on the proprietor to take reasonable precautions to protect patrons from the reasonably anticipative criminal conduct of unknown third parties. *Lopez v McDonald's Corp.* (1987) 193 CA3d 495, 504, 238 CR 436. See §10.7 for more on a business premises owner's liability for injury to employees and customers caused by the criminal conduct of others.

A recognized special relationship is that of a possessor of a chattel who puts it in the hands of someone who the supplier has reason to know is a danger to himself or to others, as when a gun dealer sells a gun and ammunition to a person showing signs of instability. See *Jacoves v United Merchandising Corp.* (1992) 9 CA4th 88, 114, 11 CR2d 468 (parents' suit dismissed; sales clerk could not have reasonably been expected to conclude from observing young man that he intended to use rifle to kill himself). See also §4.38 on negligent entrustment of motor vehicles.

See §5.8 on transit district's special relationship with, and duty to protect, passengers.

See Anno, 64 ALR5th 205 (1998) (vendor's liability for spilling food or beverage on customer).

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Source: Torts/California Tort Guide/1 General Principles/§1.29 6. Schools and School Districts

§1.29 6. Schools and School Districts

A special relationship (see §1.23) is formed between a school district and its students resulting in the imposition of an affirmative duty on the district to take all reasonable steps to protect those students; this affirmative duty is based, in part, on the compulsory nature of primary and secondary education. *M.W. v Panama Buena Vista Union Sch. Dist.* (2003) 110 CA4th 508, 517, 1 CR3d 673 (school district could be liable for failing to take adequate steps to prevent sexual assault on special education student by other eighth-grader). See *Jennifer C. v Los Angeles Unified Sch. Dist.* (2008) 168 CA4th 1320, 86 CR3d 274 (sexual assault on one "special needs" child by another made district potentially liable both for negligent supervision and for failing to fence off secluded alcove, thereby maintaining dangerous condition of public property). See also *Hoff v Vacaville Unified Sch. Dist.* (1998) 19 C4th 925, 933, 80 CR2d 811 (noted in §§1.23, 8.5; school's responsibility for off-campus injury caused by student's driving; relationship between school personnel and students analogous to that of parents and their children); *Peterson v San Francisco Community College Dist.* (1984) 36 C3d 799, 806, 205 CR 842 (duty to protect students from criminal attacks; see §§1.23, 8.29, 10.7); *Phyllis P. v Superior Court* (1986) 183 CA3d 1193, 228 CR 776 (noted in §1.22; school district had special relationship with mother of raped girl, creating duty to warn mother that girl was being molested).

NOTE: The right of students to be free from excessive force at the hands of teachers employed by the state is recognized, and causes of action and immunities are discussed, in *Preschooler II v Clark County Sch. Bd. of Trustees* (9th Cir 2007) 479 F3d 1175 (autistic and otherwise disabled 4-year-old in Nevada public school).

School authorities have a duty to supervise the conduct of students on the school grounds at all times and to enforce rules and regulations necessary to their protection. *Taylor v Oakland Scavenger Co.* (1941) 17 C2d 594, 600, 110 P2d 1044. Either a total lack of supervision or ineffective supervision may constitute a lack of ordinary care on the part of those responsible for student supervision. *Dailey v Los Angeles Unified Sch. Dist.* (1970) 2 C3d 741, 747, 751, 87 CR 376 (students engaged in unsupervised "roughhousing" and "horseplay" during school hours); *Leger v Stockton Unified Sch. Dist.* (1988) 202 CA3d 1448, 1459, 249 CR 688. See *Donovan v Poway Unified Sch. Dist.* (2008) 167 CA4th 567, 84 CR3d 285 (district liability for acting with "deliberate indifference" despite "actual knowledge" of peer sexual orientation harassment). But see *Rodriguez v Inglewood Unified Sch. Dist.* (1986) 186 CA3d 707, 714, 230 CR 823 (student stabbed by nonstudent; allegations of dangerous condition insufficient).

Even at the college level, a school district that, as part of a course, permits an inexperienced student to perform a task without instruction or supervision can be liable for injury incurred by the injured student. *Patterson v Sacramento City Unified Sch. Dist.* (2007) 155 CA4th 821, 829, 66 CR3d 337 (truck-driving course; student injured while loading wooden bleachers; Ed C §§44808, 87706 immunities inapplicable; district's duty to use reasonable care not trumped by primary assumption of risk defense or firefighter's rule).

On the other hand, a school district is not an insurer of its students' safety. *Hoyem v Manhattan Beach City Sch. Dist.* (1978) 22 C3d 508, 513, 150 CR 1 (cited for other points in §§1.16, 1.18). For example, a student suing the school for failing to expel a fellow student who later hit him must still establish that the school authorities' failure to use due care was a cause of the student's injury. *Thompson v Sacramento City Unified Sch. Dist*. (2003) 107 CA4th 1352, 132 CR2d 748. Further, the general duty imposed on school personnel by Ed C §44807 (to supervise activities of students) does not negate application of the primary assumption of risk defense (see §§1.46, 1.49) as a complete bar to recovery by students injured while participating in school-sponsored recreational or sports activities. *Avila v Citrus Community College Dist.* (2006) 38 C4th 148, 158, 41 CR3d 299 (district's duty to supervise junior college baseball pitcher did not make it liable for injury caused by his intentional retaliatory "beanball"); *Lilley v Elk Grove Unified Sch. Dist.* (1998) 68 CA4th 939, 945, 80 CR2d 638 (middle school student broke arm in after-school wrestling program); *Aaris v Las Virgenes Unified Sch. Dist.* (1998) 64 CA4th 1112, 1118, 75 CR2d 801 (cheerleading squad member injured while practicing stunt). But see *Hemady v Long Beach Unified Sch. Dist.* (2006) 143 CA4th 566, 49 CR3d 464 (liability of school district and instructor of middle school golf class to student hit in face by golf club is subject to ordinary negligence rules; primary assumption of risk doctrine not applicable; see §§1.47, 1.49).

Under Ed C §44808, a school is immunized from liability for injuries to students hurt off campus before or after

school hours. See *Cerna v City of Oakland* (2008) 161 CA4th 1340, 75 CR3d 168 (school district not responsible for injury to students hit by car while crossing street on way to school); *Bassett v Lakeside Inn, Inc.* (2006) 140 CA4th 863, 870, 44 CR3d 827 (immunity applies to allegations that district designated school a dangerous location for school bus stop; high school student in crosswalk was killed by drunk driver); *Mosely v San Bernardino City Unified Sch. Dist.* (2005) 134 CA4th 1260, 36 CR3d 724 (immunity barred district liability for alleged negligent conduct of basketball coach when team member fell from van the coach was driving); *Guerrero v South Bay Union Sch. Dist.* (2003) 114 CA4th 264, 7 CR3d 509 (first-grader hit by car while crossing street to wait for ride home).

Education Code §44808 does not completely immunize schools that have undertaken to provide transportation for students. Schools have a duty of reasonable care that continues until a student is safely loaded on the transportation. *Eric M. v Cajon Valley Union Sch. Dist.* (2009) 174 CA4th 285, 95 CR3d 428 (student left school bus while it was still on campus; student was later hit by car).

A statutory immunity provision may control over a liability statute. See *Wolfe v Dublin Unified Sch. Dist.* (1997) 56 CA4th 126, 65 CR2d 280 (district immunized by Ed C §35330 from liability for injury suffered by student on field trip despite off-site liability provisions of Ed C §44808). Similarly, the immunity provided by a regulation may prevail over a statute's liability provision. See *Barnhart v Cabrillo Community College* (1999) 76 CA4th 818, 90 CR2d 709 (soccer team member injured while traveling to away game when district-owned van driven by assistant coach blew tire and overturned; immunity provided to district by regulation (which was repealed in 2007) for injury during field trip or excursion prevailed over Ed C §87706 provision for liability for off-premises injuries during school-sponsored activity). See also *Stockinger v Feather River Community College* (2003) 111 CA4th 1014, 4 CR3d 385 (district not liable under Ed C §87706 to student injured while riding in pickup truck driven by fellow student during class assignment); *Casterson v Superior Court* (2002) 101 CA4th 177, 123 CR2d 637 (Ed C §35330 construed to immunize teacher leading field trip, as well as district); *Myricks v Lynwood Unified Sch. Dist.* (1999) 74 CA4th 231, 238, 87 CR2d 734 (immunity under Ed C §35330 or Govt C §815(a) for injuries during out-of-state trip to members of summer league basketball team who were, or would become, members of high school team).

NOTE: An amendment to CCP §340.1, operative January 1, 2003, had the effect of permitting specified childhood sexual abuse lawsuits—against persons who failed to prevent action after notice of unlawful sexual conduct—that would otherwise have been time-barred on that date, to be filed during 2003. See note in §1.30. When the defendant is a public entity, however, CCP §340.1 does not obviate the need to have complied with claim presentation requirements. *Shirk v Vista Unified Sch. Dist.* (2007) 42 C4th 201, 64 CR3d 210. On those requirements, see §§8.38-8.41. See *K.J. v Arcadia Unified Sch. Dist.* (2009) 172 CA4th 1229, 92 CR3d 1 (student's claim against district for negligent supervision of teacher who seduced her accrued when psychotherapy in adulthood convinced her teacher's conduct was wrong); *Aaronoff v Martinez-Senftner* (2006) 136 CA4th 910, 39 CR3d 137 (no time extension in suit against mother for failing to prevent molestation by father).

On school liability for student injuries, see Annos, 72 ALR5th 469 (1999) (walking to or from school), 68 ALR5th 663 (1999) (athletic events), 68 ALR5th 519 (1999) (field trips), 66 ALR5th 1 (1999) (physical education classes). See generally Glaeser and Calcagnie*, The ABC's of School Liability in California: A Primer for Lawyers, School Districts and Educators,* 36 CAOC Forum No. 2, p 30 (Consumer Attorneys of California), Mar. 2006.

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§1.30 7. Clergy and Religious Organizations

A member of the clergy who is not a licensed counselor may be held to a lesser standard of care than is a licensed professional. See *Nally v Grace Community Church* (1988) 47 C3d 278, 253 CR 97 (no special relationship between parents of person who committed suicide and nontherapist who counseled on secular and spiritual matters); *Richelle L. v Roman Catholic Archbishop* (2003) 106 CA4th 257, 269, 130 CR2d 601 (no special relationship between parishioner, despite her religiosity, and priest alleged to have seduced her; no fiduciary relationship established); *Jacqueline R. v Household of Faith Family Church, Inc.* (2002) 97 CA4th 198, 118 CR2d 264 (pastor not liable for alleged harm from consensual sexual relations with parishioner); *Quigley v First Church of Christ, Scientist* (1998) 65 CA4th 1027, 76 CR2d 792 (noted in §1.9).

An amendment to CCP §340.1, operative January 1, 2003, had the effect of permitting specified childhood sexual abuse lawsuits—against persons who failed to take preventative action after notice of unlawful sexual conduct—that would otherwise have been time-barred on that date to be filed during 2003. See *Santillan v Roman Catholic Bishop of Fresno* (2008) 163 CA4th 4, 77 CR3d 343 (triable issue whether Diocese had notice of cleric's unlawful sexual conduct); *Doe v Salesian Soc'y* (2008) 159 CA4th 474, 71 CR3d 565 (dismissal absent evidence that Society knew ahead of time that priest posed sexual molestation risk); *Roman Catholic Bishop of Oakland v Superior Court* (2005) 128 CA4th 1155, 28 CR3d 355 (ex post facto doctrine no bar to punitive damages in such suits). See also *Deutsch v Masonic Homes of Calif., Inc.* (2008) 164 CA4th 748, 80 CR3d 368 (instructions on degree of notice or knowledge required). Failure to meet specific statutory requirements could negate the revival provisions. See *Dutra v Eagleson* (2006) 146 CA4th 216, 52 CR3d 788 (plaintiff more than 25 years old failed to file required certificate of merit from attorney and mental health practitioner). Further, a lack of specificity in allegations by persons 26 or older may be grounds for dismissal. *Doe v City of Los Angeles* (2007) 42 C4th 531, 67 CR3d 330 (suit against city and Boy Scouts of America for alleged sexual abuse by officer in police department-sponsored scout program). The dismissal of lawsuits during the 1990s as untimely under the then-governing 1-year limitations statute precludes the filing of new suits based on the same facts; to permit the statutory revival of judicially final judgments would violate California's separation of powers doctrine. *Perez v Roe* (2006) 146 CA4th 171, 52 CR3d 762. Further, a time-barred cause of action is not preserved by the December 31, 2003, filing of documents that are not, taken together, a complaint. See *Hightower v Roman Catholic Bishop of Sacramento* (2006) 142 CA4th 759, 48 CR3d 420.

NOTE: In *Quarry v Doe 1* (review granted June 10, 2009, S171382; superseded court of appeal opinion at 170 CA4th 1574, 89 CR3d 640), and *K.J. v Roman Catholic Bishop of Stockton* (review granted July 8, 2009, S173042; superseded court of appeal opinion at 172 CA4th 1388, 92 CR3d 673), the California Supreme Court has granted review involving the delayed discovery provision of CCP §340.1 and its application to childhood sexual abuse claims against nonperpetrators who knew of the abuse but failed to prevent it.

Religious organizations have been exonerated from liability for harm caused by the sexual molestation of parishioners by clergymen. See, *e.g., Mark K. v Roman Catholic Archbishop* (1998) 67 CA4th 603, 79 CR2d 73 (no respondeat superior liability because abuse is outside scope of cleric's employment; extended statute of limitations for childhood sexual abuse applies to perpetrator, not employer); *Tietge v Western Province of the Servites, Inc.* (1997) 55 CA4th 382, 64 CR2d 53 (statute retroactively extending limitations period for child molestation actions applied to priest but not to his religious order); *Roman Catholic Bishop v Superior Court* (1996) 42 CA4th 1556, 50 CR2d 399 (church organization with no prior knowledge of priest's propensity to sexually exploit children not liable for negligent hiring or supervision). See Anno, 101 ALR5th 1 (2002) (liability of church or religious society for negligent hiring, retention, or supervision of clergy because of sexual misconduct).

Under particular circumstances, a religious organization resident in another state that assigns a pedophilic clergy person to a California parish must answer a personal injury lawsuit filed in California by a person alleging molestation by the person in California. *Archdiocese of Milwaukee v Superior Court (Paino)* (2003) 112 CA4th 423, 5 CR3d 154.

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E. Presumptions Affecting Proof

§1.31 1. Violation of Statute, Ordinance, or Regulation

Under Evid C §669(a), a person is presumed to have failed to exercise due care if

- the person violated a statute, ordinance, or regulation of a public entity;
- the violation proximately caused death or injury to person or property;
- the death or injury resulted from an occurrence "of the nature which" the statute, ordinance, or regulation was designed to prevent; and
- the person suffering the death or the injury to person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

When evidence is introduced or offered to show that a person violated a statute, the trial judge must determine, as a matter of law, whether the statute was designed to prevent the kind of occurrence that caused the death or injury, and whether the injured person was one of the class of persons the statute was designed to protect. See *Galvez v Frields* (2001) 88 CA4th 1410, 1421, 107 CR2d 50 (child entitled to negligence per se instruction on allegations that doctor, contrary to regulation, failed to advise mother about test that screens for neural tube defects).

The Evid C §669 presumption may not be used, for example, by a person who was not meant to be protected by the statute even if that person's injury might ultimately be traced back to the violation. See *Urhausen v Longs Drug Stores Cal., Inc.* (2007) 155 CA4th 254, 267, 65 CR3d 838 (person using crutches who fell while proceeding from parking lot to store entrance was not one meant to be protected by regulations limiting surface slope of disabled access parking spaces); *Andres v Young Men's Christian Ass'n* (1998) 64 CA4th 85, 74 CR2d 788 (statute requiring lifeguard, or "no lifeguard" sign, at swimming pools did not apply to 8' × 7' spa pool in shower room). See also *Wawanesa Mut. Ins. Co. v Matlock* (1997) 60 CA4th 583, 70 CR2d 512 (presumption does not support judgment for property owner's insurer against parent of minor whose discarded cigarette butt started fire, although minor's possession of cigarette violated statute forbidding sales to minors).

If the Evid C §669 requirements are met, and if it is found as fact from the evidence that the defendant violated the statute and that the violation caused the injury, the defendant is liable. See Law Revision Commission Comment to Evid C §669; *Nunneley v Edgar Hotel* (1950) 36 C2d 493, 225 P2d 497. Violation of a statute, ordinance, or regulation is sometimes called "negligence per se."

If a party admits to violating a protective statute or evidence of violation is undisputed, and if reasonable persons could infer from the facts only that the violation was a proximate cause of the injury, the party may be found negligent as a matter of law. See Comment to Evid C §669; *Alarid v Vanier* (1958) 50 C2d 617, 621, 327 P2d 897.

A plaintiff's violation of a statute, ordinance, or regulation may create a presumption of contributory negligence. See *Mark v PG&E* (1972) 7 C3d 170, 182, 101 CR 908 (rule recognized, but ordinance not applicable to plaintiff or to occurrence). See also Comment to Evid C §669.

The presumption may be based on violation of administrative agency regulations. See *Elsworth v Beech Aircraft Corp.* (1984) 37 C3d 540, 208 CR 874, noted in §2.7 (aircraft manufacturer's violation of Federal Aviation Agency safety standards gave rise to presumption that manufacturer negligently designed airplane even though FAA had issued certificate declaring that design met all applicable safety standards). See also *Doggett v U.S.* (9th Cir 1988) 875 F2d 684, 690 n4 (naval base regulation could establish duty of care).

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Source: Torts/California Tort Guide/1 General Principles/§1.32 a. Excluded Situations

§1.32 a. Excluded Situations

A court that determines that a particular defendant owed no legal duty to a particular plaintiff in the circumstances (see §§1.6-1.9) must then decline to predicate duty on an Evid C §669 presumption. See *California Serv. Station etc. Ass'n v American Home Assur. Co.* (1998) 62 CA4th 1166, 1177, 73 CR2d 182 (code provision and regulation prohibiting misrepresentations did not establish negligence duty of care; violating such provisions thus did not give rise to presumption of negligence; §669 concerns standard of care, not duty of care).

Evidence Code §669.1 provides that state or local government rules, policy manuals, and guidelines "setting forth standards of conduct or guidelines for [the entity's] employees in the conduct of their public employment" cannot be the basis for an Evid C §669 presumption of negligence. Section 669.1 appears to nullify the holding in *Peterson v City of Long Beach* (1979) 24 C3d 238, 244, 155 CR 360, which applied §669 to the violation of a local police manual.

A temporary restraining order issued by a court to prevent violence in a labor dispute between farm workers and growers was not intended to protect passing motorists and thus did not create an Evid C §669 presumption in favor of such a motorist. See *Stafford v United Farm Workers* (1983) 33 C3d 319, 188 CR 600. See also *Capolungo v Bondi* (1986) 179 CA3d 346, 224 CR 326 (parking too long in loading zone did not support liability to cyclist forced to veer into traffic).

An instruction that a presumption of negligence arises from violation of a statute must be based on at least some evidence that the statute was violated—although that evidence may be slight, inconclusive, or opposed to the preponderance of the evidence. See *Byrne v City & County of San Francisco* (1980) 113 CA3d 731, 737, 170 CR 302 (pedestrian right-of-way rule).

Under Lab C §6404.5, violation of certain employment safety statutes and regulations cannot, in some cases, be used to create a presumption of negligence. See §6.2.

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§1.33 b. Violations Shifting Burden of Proof

If the violation of a protective regulation has the effect of eliminating evidence that would show whether the violation caused the injury, the burden of proof on causation shifts: Proximate cause is taken to be established absent proof that the violation was not the proximate cause of the injury. *Haft v Lone Palm Hotel* (1970) 3 C3d 756, 765, 91 CR 745. See *Smith v Americania Motor Lodge* (1974) 39 CA3d 1, 5, 113 CR 771.

Establishing the Evid C §669 factors permits an inference that the injury proximately flowed from the violation. See *McGee v Cessna Aircraft Co.* (1983) 139 CA3d 179, 185, 188 CR 542, also noted in §2.10 (violation of Federal Aviation Agency regulation shifted burden of proving absence of causation to defendant). This burden, however, shifts to the defendant only if (1) the injured person belongs to the class that the regulation was designed to protect and (2) the injury is the type the regulation was promulgated to avoid. See *Fagerquist v Western Sun Aviation, Inc.* (1987) 191 CA3d 709, 236 CR 633 (policy reasons relied on in *Haft* and *McGee* not present; destruction of evidence in crash did not prevent accident reconstruction; defendant's compliance with regulatory requirements would not have eased plaintiff's evidentiary burden of proving that defendant's negligent maintenance proximately caused accident).

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§1.34 c. Rebutting the Presumption

Anyone alleged to have violated a protective statute may rebut the presumption of negligence by proving that he or she did what might reasonably be expected of a person of ordinary prudence who desired to comply with the law, acting in similar circumstances. Evid C §669(b)(1). Because the presumption is one affecting the burden of proof (see Evid C §660), the person must convince the trier of fact that it is more probable than not that the violation was reasonable and justifiable under the circumstances. See Law Revision Commission Comment to Evid C §669. Normally, the trier of fact must decide from the evidence whether the violation was justified and the presumption of negligence thus rebutted. See *Fuentes v Panella* (1953) 120 CA2d 175, 182, 260 P2d 853, 857. See also *McCaughan v Hansen Pac. Lumber Co.* (1959) 176 CA2d 827, 833, 1 CR 796, 800 (instruction on excuse improper absent evidence).

A child can rebut the presumption by proving that he exercised the degree of care ordinarily used by persons of his maturity, intelligence, and capacity under similar circumstances, but the presumption is not thus rebutted if the violation occurred in the course of an activity normally engaged in only by adults and requiring adult qualifications. Evid C §669(b)(2). See §1.20.

A person seeking to rebut the Evid C §669 presumption of negligence must show particular circumstances that prevented that person from complying with the particular statute despite the person's desire to comply, not just a general desire to be law abiding. *Casey v Russell* (1982) 138 CA3d 379, 385, 188 CR 18 (no evidence that drivers knew law, or desired or attempted to comply with it).

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§1.35 2. Res Ipsa Loquitur

The doctrine of res ipsa loquitur (the thing speaks for itself) applies when the accident is of such a nature that it can be said, in the light of past experience, that (a) the accident was probably the result of someone's negligence and (b) the defendant is probably the person responsible. *Zentz v Coca Cola Bottling Co.* (1952) 39 C2d 436, 446, 247 P2d 344, 349; *Folk v Kilk* (1975) 53 CA3d 176, 184, 126 CR 172. See §§1.36-1.37 for other wordings.

Res ipsa loquitur is a presumption affecting the burden of producing evidence. Evid C §646. The doctrine permits a trier of fact to find that a defendant's negligent conduct caused a plaintiff's injuries even without evidence of specific wrongful acts or omissions by the defendant. See Law Revision Commission Comment to Evid C §646. The introduction of evidence of specific acts of negligence does not, however, bar application of the presumption. *Bedford v Re* (1973) 9 C3d 593, 599, 108 CR 364.

On the application of res ipsa loquitur in particular situations, see §§2.3 and 2.18 (air carriers), 4.5 (motor vehicles), 5.13-5.17 (passenger carriers), 9.40-9.45 (medical malpractice), and 11.56 (product liability).

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Source: Torts/California Tort Guide/1 General Principles/§1.36 a. Conditions

§1.36 a. Conditions

The plaintiff invokes res ipsa loquitur by introducing evidence that the accident (or the injury)

- is of a kind that ordinarily does not occur absent someone's negligence;
- was caused by an agency or instrumentality within the defendant's exclusive control; and
- was not due to any voluntary action or contribution of the plaintiff.

Newing v Cheatham (1975) 15 C3d 351, 359, 124 CR 193; *Gicking v Kimberlin* (1985) 170 CA3d 73, 75, 215 CR 834; *Frantz v San Luis Med. Clinic* (1978) 81 CA3d 34, 43, 146 CR 146. Whenever there is *some* evidence that each of the three conditions was met, the trial court should give a conditional res ipsa loquitur instruction (such as CACI 417 (2003), BAJI 4.00 (9th ed 2002)); it is not required that all three conditions be conclusively satisfied. *Levy-Zenter Co. v Southern Pac. Transp. Co.* (1977) 74 CA3d 762, 777, 142 CR 1.

The Law Revision Commission Comment to Evid C §646 sets out guidelines for applying the res ipsa loquitur presumption in jury trials:

- If the conditions for applying the doctrine have been shown, and if there is no evidence that would support a finding that the defendant used due care or that the accident resulted from some cause other than defendant's negligence, the jury should be instructed that it must find that the accident was caused by defendant's negligence;
- If there is evidence that would support a finding of each condition for application of res ipsa loquitur, but the existence of at least one condition is contested, the jury must be given a "conditional" res ipsa loquitur instruction to the effect that, if it finds that the basic conditions have been established by a preponderance of the evidence, it may then also find that the accident was caused by the defendant's negligent conduct;
- No res ipsa loquitur instruction should be given if there is no evidence or permissible inference to support a finding of any one of the three basic conditions, or if one of the conditions is otherwise found not to exist as a matter of law.

The defendant is presumed negligent as a matter of law, and a res ipsa loquitur instruction need not be given, when the conditions for applying the doctrine are present as a matter of law and the defendant has failed to introduce sufficient evidence to sustain a finding either that he exercised due care in all possible respects in which he might have been negligent, or that the accident resulted from some cause other than his negligence. See *Newing v Cheatham* (1975) 15 C3d 351, 364, 124 CR 193 (arguing other possible causes insufficient).

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§1.37 (1) Negligence Ordinarily the Cause

In deciding whether the accident was of a kind that ordinarily results from negligence, a court may consider expert testimony, common knowledge or experience, and the circumstances of the particular occurrence; negligence need not be the only possible explanation of the accident, merely the most probable. *Newing v Cheatham* (1975) 15 C3d 351, 359, 124 CR 193; *Roddiscraft, Inc. v Skelton Logging Co.* (1963) 212 CA2d 784, 795, 28 CR 277, 284. See *Blackwell v Hurst* (1996) 46 CA4th 939, 944, 54 CR2d 209 (plaintiff introduced sufficient evidence that dental crown does not ordinarily fall down throat during fitting to permit jury, aided by common knowledge, to draw inference of dentist's negligence).

On the other hand, res ipsa loquitur does not apply if the plaintiff fails to establish that the defendant's negligence was the more probable explanation of the accident. See *Gicking v Kimberlin* (1985) 170 CA3d 73, 215 CR 834 (fire could have started either on defendant's premises or on premises of parties' common landlord). Nor does it apply to conditions that cannot be anticipated or avoided. *Kohler v Aspen Airways, Inc.* (1985) 171 CA3d 1193, 214 CR 720 (unreported air turbulence).

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§1.38 (2) Instrumentality Controlled by Defendant

A plaintiff can establish that the instrumentality that caused his injury was in the defendant's control by showing that it was not mishandled or changed after defendant relinquished control of it. *Bedford v Re* (1973) 9 C3d 593, 597, 108 CR 364 (exclusive control need not be shown); *Zentz v Coca Cola Bottling Co.* (1952) 39 C2d 436, 443, 247 P2d 344, 348 (requirement not absolute; plaintiff need not exclude all other possibly responsible persons).

In some situations, several defendants are deemed to have been in control, and are jointly and severally liable without an explanation of how the accident occurred. See *Clark v Gibbons* (1967) 66 C2d 399, 409, 58 CR 125, 132; *Ybarra v Spangard* (1944) 25 C2d 486, 154 P2d 687. See also *Tobler v Chapman* (1973) 31 CA3d 568, 582, 107 CR 614 (innocent bystanders entitled to have all other actors explain their conduct).

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§1.39 (3) No Voluntary Contribution by Plaintiff

Evidence that no voluntary action by the plaintiff contributed to the accident need not show that he was entirely inactive as long as the evidence eliminates his conduct as a factor contributing to the occurrence. *Newing v Cheatham* (1975) 15 C3d 351, 363, 124 CR 193 (purpose of this requirement is to establish that defendant is probably responsible); *Vistica v Presbyterian Hosp.* (1967) 67 C2d 465, 62 CR 577 (voluntary conduct must be responsible cause).

A plaintiff's burden of showing no voluntary contribution is distinct from the defendant's burden of proving that the plaintiff was contributorily negligent. See *Shahinian v McCormick* (1963) 59 C2d 554, 560, 30 CR 521, 524.

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§1.40 b. Rebutting the Presumption

In addition to contesting the existence of the basic conditions for application of the res ipsa loquitur doctrine (see §1.36), a defendant may introduce evidence that he was not negligent or that something other than his negligence caused the accident. If the evidence is sufficient to sustain a finding of either the defendant's due care or a cause of the accident other than his negligence, the presumptive effect of the doctrine vanishes, although the trier of fact may still infer from the evidence (including evidence that supports application of the doctrine) that defendant's negligence caused plaintiff's injuries. Law Revision Commission Comment to Evid C §646.

When evidence to rebut the presumption has been introduced, the court, on request, must instruct the jury as follows (Evid C §646(c)):

- It may infer from the facts that would give rise to a res ipsa loquitur presumption that the accident was proximately caused by the defendant's negligent conduct; and
- It should not find that the defendant's negligence caused the accident unless it believes, after weighing all the evidence and drawing all warranted inferences, that it is more probable than not that defendant's negligence caused the accident.

A res ipsa loquitur instruction should not be given in the rare cases in which a defendant introduces such conclusive evidence of his due care, or of another cause of the accident, that the presumption of negligence that would normally arise from the circumstances of the occurrence is dispelled as a matter of law. See *Leonard v Watsonville Community Hosp.* (1956) 47 C2d 509, 514, 305 P2d 36, 39.

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F. Defenses to Negligence Claims

§1.41 1. Comparative Fault

Under California's comparative fault system, judicially adopted in 1975, a plaintiff's contributory negligence is compared with the causative negligence of defendants and other persons, and the damages awarded are diminished in proportion to the amount of negligence attributable to the person recovering. *Li v Yellow Cab Co.* (1975) 13 C3d 804, 828, 119 CR 858, 875. The comparative fault doctrine replaces an "all or nothing" rule under which any contributory negligence by the plaintiff was usually a complete bar to recovery. See Restatement (Second) of Torts §467 (1965). *Li v Yellow Cab Co., supra,* adds that the doctrine of last clear chance, which created an exception to the rule that contributory negligence barred recovery, is abolished.

The comparative fault system changes the *effect* of a finding of contributory negligence (it is no longer a complete bar to recovery), but the concept and definition of contributory negligence (see §1.42) remain unchanged. See *Endicott v Nissan Motor Corp.* (1977) 73 CA3d 917, 929, 141 CR 95 (contributory negligence remains defense to action based on negligence or negligence per se); *Wittenbach v Ryan* (1976) 63 CA3d 712, 718, 134 CR 47. For example, under comparative fault, a plaintiff is not barred by contributory negligence from invoking res ipsa loquitur (see §1.35) to establish the defendant's liability. *Emerick v Raleigh Hills Hosp.* (1982) 133 CA3d 575, 585, 184 CR 92.

The adoption of the comparative negligence system has not changed the requirement that a plaintiff must establish a prima facie case by proving that the defendant was negligent and that that negligence was a proximate cause of the plaintiff's injuries. *Romo v Southern Pac. Transp. Co.* (1977) 71 CA3d 909, 915, 139 CR 787.

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Source: Torts/California Tort Guide/1 General Principles/§1.42 a. Contributory Negligence

§1.42 a. Contributory Negligence

Contributory negligence is conduct by a plaintiff that (1) falls below the standard to which he should conform for his own protection and (2) is a legally contributing cause, concurring with the negligence of the defendant, in bringing about the plaintiff's harm. *Gyerman v United States Lines Co.* (1972) 7 C3d 488, 500, 102 CR 795; *Barton v Owen* (1977) 71 CA3d 484, 505, 139 CR 494. See Restatement (Second) of Torts §463 (1965). See §1.41 on the effect of contributory negligence under California's comparative fault system.

The standard for determining contributory negligence normally applied to an adult plaintiff is "ordinary" care—the amount of care that would be used by a person of ordinary prudence in the same circumstances. See CC §1714(a); *Gyerman v United States Lines Co., supra; Rodriguez v McDonnell Douglas Corp.* (1978) 87 CA3d 626, 644, 151 CR 399.

On the standard applied to children and handicapped persons, see §§1.20-1.21. See also *Pittman v Pedro Petroleum Corp.* (1974) 42 CA3d 859, 864, 117 CR 220. A child younger than 5 years is, as a matter of law, incapable of contributory negligence. See *Fowler v Seaton* (1964) 61 C2d 681, 687, 39 CR 881; *Christian v Goodwin* (1961) 188 CA2d 650, 10 CR 507.

Contributory negligence is an issue on which an instruction must be given only if there is substantial evidence of negligence by the plaintiff; this standard cannot be met by mere speculation or conjecture. *Drust v Drust* (1980) 113 CA3d 1, 6, 169 CR 750 (no direct evidence that passenger distracted driver immediately before crash).

Because a plaintiff's negligence is the failure to use due care for his own protection, it is not equivalent in culpability to a defendant's negligence, which is a lack of due care for the safety of others. *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 589, 146 CR 182. See *Daly v General Motors Corp.* (1978) 20 C3d 725, 735, 144 CR 380 (contributory negligence lacks the final element of negligence, a duty of care owed to another; it might better be termed "contributory fault").

NOTE: The United States Supreme Court has held that, in a lawsuit brought under the Federal Employers' Liability Act (FELA) (45 USC §§51-60), it was reversible error for a trial judge to instruct that the standard applied to the contributory negligence of the injured worker differed from the standard applied to the negligent conduct for which the employer was responsible. See *Norfolk S. Ry. Co. v Sorrell* (2007) 549 US 158, 166 L Ed 2d 638, 127 S Ct 799 (lower courts applied Missouri law). See §12.10 on contributory fault in injuries at railroad crossings.

A defendant who wishes to raise the defense of the plaintiff's contributory negligence has the burden of proving that the plaintiff's fault was a proximate or legal cause of his injuries. *Gyerman v United States Lines Co.* (1972) 7 C3d 488, 503, 102 CR 795 (applying substantial factor test of Restatement §465(1)). A plaintiff's violation of a safety statute or regulation is prima facie evidence of contributory negligence. See *Mark v PG&E* (1972) 7 C3d 170, 182, 101 CR 908. See generally §1.22.

Contributory negligence is normally a question of fact; it is established as a matter of law only if reasonable persons could have drawn that conclusion and no other from the evidence. *Mark v PG&E* (1972) 7 C3d 170, 180, 101 CR 908.

See Anno, 2 ALR6th 429 (2005) (admissibility of evidence of use or nonuse of bicycle helmet).

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§1.43 (1) "Secondary" Assumption of Risk

Much of the plaintiffs' conduct that formerly came within the scope of "assumption of the risk" is now called "secondary assumption of risk" and is treated as a form of contributory negligence that may proportionally reduce, but not bar, a plaintiff's damages recovery. See *Knight v Jewett* (1992) 3 C4th 296, 304, 11 CR2d 2; *Li v Yellow Cab Co.* (1975) 13 C3d 804, 824, 119 CR 858. For example, unreasonably exposing oneself to a risk created by a defendant's negligence is itself no more than contributory negligence. *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 536, 34 CR2d 630 (applying rescue doctrine (see §1.44) and rejecting application of firefighter's rule (see §1.55)).

See §§1.46-1.53 on "primary" assumption of risk as a complete bar to recovery and on distinguishing secondary from primary assumption of risk. See Anno, 16 ALR4th 700 (1982) (effect of comparative negligence on assumption of risk).

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§1.44 (2) Rescue Situations

A plaintiff's conduct that would otherwise be contributory negligence (or secondary assumption of risk) acts neither to bar, nor to reduce, damages if the plaintiff was using due care and, in order to perform a rescue necessitated by the defendant's negligence, encountered a risk of harm created by defendant. *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 536, 34 CR2d 630 (oilfield workers injured in explosion while trying to cap flammable leak created by defendant's negligence); *Solgaard v Guy F. Atkinson Co.* (1971) 6 C3d 361, 366, 99 CR 29 (doctor called to construction site to rescue trapped worker). See *Wharf v Burlington N. R.R.* (9th Cir 1995) 60 F3d 631 (railroad worker engaged in rescue not contributorily negligent absent evidence that his conduct was wanton or reckless). Further, a plaintiff who is injured while acting to protect or rescue others from an imminent peril (*i.e.,* from an apparently dangerous situation) need have exercised only the care that an ordinarily prudent person would have used in the same situation, even if the apparent peril does not materialize. See *Harris v Oaks Shopping Center* (1999) 70 CA4th 206, 82 CR2d 523 (plaintiff who thought structure was about to collapse and injure others was entitled to imminent peril instruction in BAJI 4.40 (9th ed 2002) although structure did not actually collapse). See CACI 452 (2003).

This rescue doctrine applies when the plaintiff was injured while trying to rescue the defendant himself (not only a third person) from danger created by the defendant's negligent conduct. *Sears v Morrison* (1999) 76 CA4th 577, 90 CR2d 528 (rejecting any contrary implication drawable from *Holland v Crumb* (1994) 26 CA4th 1844, 32 CR2d 366, which is noted in §§4.79, 10.23).

Various statutes provide "Good Samaritan" immunity from liability to defendants alleged to have injured a plaintiff while seeking to rescue that plaintiff from a perceived dangerous situation. See §9.79. Health & Safety Code §1799.102 immunizes a person who provides emergency medical or nonmedical care at the scene of an emergency.

See Anno, 75 ALR4th 875 (1990) (applicability of comparative negligence principles to rescue doctrine).

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Source: Torts/California Tort Guide/1 General Principles/§1.45 b. Contributory Willful Misconduct

§1.45 b. Contributory Willful Misconduct

Under the comparative fault system (see §1.41), a plaintiff's contributory willful misconduct—like a plaintiff's contributory negligence—does not bar recovery of damages from a defendant charged with either negligence or willful misconduct, although plaintiff's damages must be diminished in proportion to the amount of fault attributed to plaintiff (compared with fault attributed to defendants and others). *Zavala v Regents of Univ. of Cal.* (1981) 125 CA3d 646, 651, 178 CR 185 (damages of voluntarily intoxicated plaintiff who fell from stairway balcony reduced by 80 percent). See *Plyler v Wheaton Van Lines* (9th Cir 1981) 640 F2d 1091; *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). See definition and discussion of willful misconduct in §§1.57-1.61. See Anno, 18 ALR5th 525 (1994) (applicability of contributory negligence principles to intentional torts); 10 ALR4th 946 (1981) (applicability to, *e.g.,* recklessness, gross negligence).

NOTE: Two opinions concluding that a plaintiff's recovery is barred by his willful misconduct in driving a car after voluntarily becoming intoxicated are *Trenier v California Inv. & Dev. Corp.* (1980) 105 CA3d 44, 164 CR 156, and *Sissle v Stefenoni* (1979) 88 CA3d 633, 152 CR 56. Neither *Trenier* nor *Sissle,* however, appears to have considered whether the advent of comparative fault affected the former rule that proving a plaintiff's contributory willful misconduct provided a complete defense to a cause of action based on either the defendant's willful misconduct or the defendant's negligence.

Whether a plaintiff's conduct amounts to contributory willful misconduct is normally a question of fact for jury resolution, not a question of law. *Ewing v Cloverleaf Bowl* (1978) 20 C3d 389, 404 n10, 143 CR 13.

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2. Assumption of Risk

§1.46 a. "Primary" (Implied) Assumption of Risk

A plaintiff may be held to have assumed the risks posed by the defendant's conduct either expressly (see §1.54) or impliedly (based on the situation and the plaintiff's conduct). A plaintiff's implied assumption of risk is termed "primary," and it acts as a complete bar to recovery, when the law views the circumstances in which the injury occurred as relieving the defendant from the duty to use ordinary care and skill, in managing his or her person or property, to avoid injuring the plaintiff. *Knight v Jewett* (1992) 3 C4th 296, 308, 11 CR2d 2 (primary assumption of risk "embodies a legal conclusion that there was 'no duty' on the part of the defendant to protect the plaintiff from a particular risk").

A plaintiff who voluntary participates in a sporting or recreational activity is held to have assumed the risks inherent in that activity. This is a primary assumption of risk that relieves coparticipants in the activity from the duty to use ordinary care and skill to avoid injuring the plaintiff. See *Avila v Citrus Community College Dist.* (2006) 38 C4th 148, 158, 41 CR3d 299 (junior college baseball player deemed to have assumed the risk of being injured by opponent's intentional retaliatory "beanball"; see also §1.29); *Cheong v Antablin* (1997) 16 C4th 1063, 1068, 68 CR2d 859 (skier hit by other skier who admitted he was going too fast); *Knight v Jewett, supra* (touch football game player hurt by other player's aggressive, or clumsy, play); *Ford v Gouin* (1992) 3 C4th 339, 11 CR2d 30 (waterskier pulled into overhanging branch by boat operator; doctrine applies to "cooperative" as well as "competitive" sports). See Annos, 15 ALR6th 161 (2006) (snowboarding), 92 ALR5th 473 (2001) (skydiving, parachuting, parasailing), 75 ALR5th 583 (2000) (skiing), 55 ALR5th 529 (1998) (athletic team coparticipants), 34 ALR5th 77 (1995) (waterskiing).

Even a primary assumption of risk, however, is not a bar to recovery if the defendant intentionally injured the plaintiff or engaged in conduct that was "so reckless as to be totally outside the range of the ordinary activity involved in the sport." *Knight v Jewett* (1992) 3 C4th 296, 320, 11 CR2d 2. Whether a defendant's conduct was sufficiently reckless to negate the complete defense is ordinarily a question of fact. *Shin v Ahn* (2007) 42 C4th 482, 64 CR3d 803 (golfer hit by errant tee shot; also noted in §§1.48, 1.51); *Lackner v North* (2006) 135 CA4th 1188, 1199, 37 CR3d 863 (snowboarder ran at high speed into resting skier; also noted in §1.4). But see *Avila v Citrus Community College Dist., supra* (pitcher's intentional "brush back" pitch was within ordinary activity of baseball). Further, assumption of risk is not a defense in hunting accident cases "because of the special danger to others posed by the sport of hunting." 3 C4th at 320 n7.

NOTE: Except when applying the firefighter's rule (see §1.55) and the veterinarian's rule (see §3.30), the California Supreme Court, since reformulating the assumption of risk defense in *Knight,* has upheld the application of the complete (primary) defense only in cases in which a plaintiff voluntarily participated in a sporting or recreational activity. See *Cheong v Antablin, supra,* in which the court says that the general rule (that everyone has a duty to use due care to avoid injuring others) does not apply to coparticipants in a sport, where conditions or conduct that otherwise might be viewed as dangerous often are an integral part of the sport itself.

Several court of appeal panels, however, have seen a primary assumption of risk in nonrecreational situations. In addition to veterinarian's rule cases cited in §3.30, see *McGarry v Sax* (2008) 158 CA4th 983, 70 CR3d 519 (after skateboarding exhibition, spectator who voluntarily joined group to which products were being thrown assumed risk of injury from being knocked down by coparticipants); *Saville v Sierra College* (2005) 133 CA4th 857, 36 CR3d 515 (student injured during course on police take-down techniques; *Hamilton v Martinelli & Assocs.* (2003) 110 CA4th 1012, 2 CR3d 168 (peace officer injured during required unarmed defensive tactics training conducted by county-hired consultant assumed risk of instructor's negligent application of hold; see also notes in §§1.49, 1.55); *Rosenbloom v Hanour Corp.* (1998) 66 CA4th 1477, 78 CR2d 686 (employee of company hired to move shark to new tank assumed risk of being bitten; see §3.29). See also discussion in §6.23 of *Dyer v Superior Court* (1997) 56 CA4th 61, 65 CR2d 85 (tow truck driver held to have assumed risk of being hit by passing vehicle while preparing to tow vehicle that had broken down on highway), and *Herrle v Estate of Marshall* (1996) 45 CA4th 1761, 53 CR2d 713 (nurse's aide injured by Alzheimer's patient). See cases reviewed in *Patterson v Sacramento*

City Unified Sch. Dist. (2007) 155 CA4th 821, 839, 66 CR3d 337 (student injured while loading wooden bleachers during truck-driving course; discussed in §1.29).

Other forms of assumption of risk that may provide a complete defense (*i.e.,* that may bar a plaintiff's recovery) are discussed in §§1.54 (express assumption of risk and exculpatory agreements) and 1.55 (firefighter's rule). On "secondary" implied assumption of risk, a species of contributory fault that may proportionally diminish but not bar a plaintiff's recovery, see §1.43.

For discussion of the application of the assumption of risk defense in particular settings, see §§3.30 (veterinarians), 3.31-3.32 (horseback riders), 6.23 (workers injured on the job), 10.46 (premises liability), and 11.43 (product liability).

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§1.47 (1) Distinguishing "Primary" From "Secondary"

Whether a factual situation gives rise to a primary assumption of risk turns on "the nature of the activity or sport in which the defendant is engaged and the relationship of the defendant and the plaintiff to that activity or sport," not on the reasonableness or unreasonableness of the plaintiff's participation. *Knight v Jewett* (1992) 3 C4th 296, 309, 11 CR2d 2. The court, not the jury, decides whether the admitted or established facts show a primary assumption of risk. 3 C4th at 313. That is, it is for the court to decide (1) whether the activity is an active sport (see §1.48), (2) what are the risks inherent in that sport (see §1.51), and (3) whether the defendant increased the risks beyond those inherent in the sport. See *Hemady v Long Beach Unified Sch. Dist.* (2006) 143 CA4th 566, 573, 49 CR3d 464 (student hit in face by golf club during golf class; primary assumption of risk doctrine not applicable to school district and instructor; see §§1.29, 1.49). But see *Towns v Davidson* (2007) 147 CA4th 461, 471, 54 CR3d 568 (judge and appellate panel rule that "skiing quickly and aggressively," concentrating on technique instead of whether other skiers were in way, is not "outside the range of ordinary activity involved in skiing").

Even when a plaintiff bases avoidance of a primary assumption of risk defense on evidence that the defendant increased the risk inherent in the activity (see §§1.46, 1.50), essentially converting the defense to one of secondary assumption of risk (*i.e.,* contributory negligence), it can be error for a trial judge to fail to instruct the jury that the defendant had no duty to protect the plaintiff from risks inherent in the activity. *Vine v Bear Valley Ski Co.* (2004) 118 CA4th 577, 601, 13 CR3d 370 (2-to-1 split on whether instructions given were adequate to support verdict for plaintiff injured in snowboard jumping contest over jump altered by defendant).

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Source: Torts/California Tort Guide/1 General Principles/§1.48 (2) Need for 'Active Sport' and 'Coparticipant'

§1.48 (2) Need for "Active Sport" and "Coparticipant"

Some courts have rejected the primary assumption of risk defense in cases in which the defendant and the plaintiff were not viewed as "coparticipants" in a "sport" that was "active." See *Kindrich v Long Beach Yacht Club* (2008) 167 CA4th 1252, 84 CR3d 824 (jumping from boat to dock after having scattered father's ashes at sea was not type of sporting activity to which primary assumption of risk doctrine applies); *Morgan v FUJI Country USA, Inc.* (1995) 34 CA4th 127, 40 CR2d 249 (golfer hit by other golfer's errant shot not barred from suing country club for negligent course design and maintenance). See also *Bush v Parents Without Partners* (1993) 17 CA4th 322, 21 CR2d 178 (social dancer not barred from suing dance organizer and hall owner for making floor dangerously slippery; recreational dancing not "sport" within *Knight*'s ambit). But see *Shin v Ahn* (2007) 42 C4th 482, 64 CR3d 803 (primary assumption of risk defense can be invoked by golfer whose errant tee shot hit member of threesome; also noted in §§1.46, 1.51); *Towns v Davidson* (2007) 147 CA4th 461, 465, 54 CR3d 568 (coparticipant status not negated by fact that defendant was "ski host manager," skiing within scope of employment, when he ran into skiing guest); *Mastro v Petrick* (2001) 93 CA4th 83, 89, 112 CR2d 185 (snowboarder deemed to owe no duty to skier using same slope; coparticipant analysis not determinative).

Operating a personal watercraft for pleasure (and not merely as a means to travel from one point to another) is a "sports activity" to which the primary assumption of risk doctrine applies. *Peart v Ferro* (2004) 119 CA4th 60, 13 CR3d 885 (Sea-Doo; application of doctrine not negated by regulation of such craft by statute). See *Truong v Nguyen* (2007) 156 CA4th 865, 879, 67 CR3d 675 (riding as passenger on Polaris SLX was sports activity; both operator and owner exonerated by doctrine). But see *Shannon v Rhodes* (2001) 92 CA4th 792, 112 CR2d 217 (merely riding around lake as passenger in ski boat not, by itself, a "sport"; thus, operator could be liable for negligence causing injury to 6-year-old passenger).

In addition, cases noted in §§1.49-1.52 have viewed such activities as sport fishing, golf, white water rafting, and being towed around a lake in an inner tube by a motor boat as "sports" that were sufficiently "active" to subject participants to primary assumption of risk as a complete defense.

By contrast, a child's use of a "razor" scooter on a public sidewalk is not an activity to which a primary assumption of risk defense can be raised by an entity sued for a dangerous condition of public property absent a finding that the use involved an element of danger, required physical exertion and skill, and included a competitive challenge. *Childs v County of Santa Barbara* (2004) 115 CA4th 64, 8 CR3d 823.

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§1.49 (3) Liability of Instructors, Coaches, and Trainers

A sport instructor is liable to a student only if the instructor (1) intentionally injured the student or (2) engaged in conduct that is reckless in the sense that it is totally outside the range of the ordinary activity involved in teaching or coaching the sport. *Kahn v East Side Union High Sch. Dist.* (2003) 31 C4th 990, 1003, 4 CR3d 103 (evidence raised issue whether high school swim coach recklessly ordered inexperienced and fearful 14-year-old to dive into shallow pool without instructing on how to do so safely); *Rostai v Neste Enters.* (2006) 138 CA4th 326, 41 CR3d 411 (personal fitness trainer had complete defense to heart attack victim's suit, despite failing to assess client's cardiac risk factors); *Saville v Sierra College* (2005) 133 CA4th 857, 36 CR3d 515 (college, as instructor in police take-down techniques, entitled to complete defense). The *Kahn* decision seems to recognize that a coach or instructor can be liable for conduct that "increase[s] the risks inherent in the learning process undertaken by the student." See *Kahn*, 31 C4th at 1006. But see *Hemady v Long Beach Unified Sch. Dist.* (2006) 143 CA4th 566, 49 CR3d 464 (student in middle school golf class, hit in face by golf club, needed to establish only instructor's or school district's ordinary negligence, not that instructor increased risks of sport; see §§1.29, 1.47).

Before the *Kahn* decision, some courts had rejected the application of assumption of risk as a complete defense if the plaintiff was injured while acting under the direction of an instructor, trainer, or coach. See *Wattenbarger v Cincinnati Reds, Inc.* (1994) 28 CA4th 746, 33 CR2d 732 (instructor told high school baseball player with sore arm to continue pitching during professional "tryout"). See also horseback riding instructor cases in §3.24.

Conversely, other courts had permitted instructors (and their employers) to assert primary assumption of risk as a complete defense absent evidence that the instructor's conduct increased the risk of harm to the student beyond the risk inherent in the sport, saying that an instructor is not an insurer of the student's safety. See *Rodrigo v Koryo Martial Arts* (2002) 100 CA4th 946, 956, 122 CR2d 832 (martial arts student kicked by another student; instructor did nothing to increase inherent risks; plaintiff's expectation she would not be injured and contention that class was negligently supervised irrelevant); *West v Sundown Little League of Stockton, Inc.* (2002) 96 CA4th 351, 358, 116 CR2d 849 (coach who threw fly balls so that 10-year-old could practice catching while looking into setting sun did not increase risk inherent in baseball); *Kane v National Ski Patrol Sys., Inc.* (2001) 88 CA4th 204, 212, 105 CR2d 600 (ski instructor's failure to assess participants' skill and difficulty of particular terrain was not "recklessness" that precluded complete defense); *Aaris v Las Virgenes Unified Sch. Dist.* (1998) 64 CA4th 1112, 1117, 75 CR2d 801 (cheerleader injured while practicing stunt; no evidence that coach took students beyond their level of experience and capability); *Balthazor v Little League Baseball, Inc.* (1998) 62 CA4th 47, 72 CR2d 337 (11-year-old player hit by pitch; coaches' failure to terminate game as dusk approached did not negate defense; league had duty not to raise risk of injury, but no duty to lower risk by requiring safer batting helmets); *Fortier v Los Rios Community College Dist.* (1996) 45 CA4th 430, 52 CR2d 812 (collision with other player was risk inherent in "noncontact" football drill during physical education class; instructor supervising class did nothing to increase that risk); *Bushnell v Japanese-American Religious and Cultural Ctr.* (1996) 43 CA4th 525, 50 CR2d 671 (judo instructor did nothing to increase risk inherent in learning judo). See also *Allan v Snow Summit, Inc.* (1996) 51 CA4th 1358, 59 CR2d 813 (exculpatory agreement—see §1.54—provided complete defense despite allegations that instructor increased inherent risks).

NOTE: A court of appeal—unswayed by declarations that the hired instructor of a peace officer training course in unarmed defensive tactics had used unnecessary and inappropriate force in holding down a trainee and harbored bitter feelings against her—upheld a summary judgment based on a primary assumption of risk defense. See *Hamilton v Martinelli & Assocs.* (2003) 110 CA4th 1012, 2 CR3d 168 (also noted in §§1.46, 1.55).

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§1.50 (4) Liability of Equipment Suppliers

A defendant who supplied equipment used in a sport or recreational activity can be liable for injury resulting from defects in the equipment. *Ford v Polaris Indus.* (2006) 139 CA4th 755, 775, 43 CR3d 215 (manufacturer of recreational equipment has duty to employ designs that reduce risks to users; alternative design of personal watercraft would have reduced danger of orifice injuries; see also §§11.10, 11.43); *Bunch v Hoffinger Indus., Inc.* (2004) 123 CA4th 1278, 1304, 20 CR3d 780 (manufacturer of four-foot-deep, aboveground swimming pool liable to 11-year-old for failing to warn against diving into pool; also noted in §§11.14, 11.16, 11.43). Liability for negligently supplying defective equipment can exist even if the defendant was a coparticipant and his or her conduct during the activity cannot be said to have been reckless or to have involved an intent to injure. *Bjork v Mason* (2000) 77 CA4th 544, 553, 92 CR2d 49 (boat operator towing person riding in "inner tube" could be liable when tow rope that operator supplied snapped and hit rider in eye; under Restatement (Second) of Torts §§388 and 405 (1965), either gratuitous or commercial supplier can be liable). See *Giardino v Brown* (2002) 98 CA4th 820, 834, 120 CR2d 77 (novice horseback rider at Girl Scout camp did not assume risk of injury when supplied with inappropriately spirited horse; court questions reasoning in *Balthazor v Little League Baseball, Inc.* (1998) 62 CA4th 47, 72 CR2d 337). See also *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 128 CR2d 529, discussed in §1.51, in which a new kind of aluminum baseball bat increased pitchers' risk of being hit by batted balls traveling at speeds higher than those generated by traditional bats.

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Source: Torts/California Tort Guide/1 General Principles/§1.51 (5) Liability for Risks Deemed Not 'Inherent'

§1.51 (5) Liability for Risks Deemed Not "Inherent"

Appellate courts have distinguished primary from secondary assumption of risk on the broader basis of whether (a) the risk that caused the injury was "inherent" in the activity, (b) the defendant's conduct did not breach the duty to "use due care not to increase the risks to a participant" above the inherent risks, and (c) denial of a complete defense would impose a duty that "might chill vigorous participation in the implicated activity and thereby alter its fundamental nature." See *Shin v Ahn* (2007) 42 C4th 482, 64 CR3d 803 (fact question whether golfer, teeing off without ascertaining whether coparticipant was out of line of fire, unacceptably raised risk inherent in sport; also noted in §§1.46, 1.48).

Cases using the broader analysis to apply a complete defense include *Levinson v Owens* (2009) 176 CA4th 1534, 98 CR3d 779 (no showing that host who let guest ride horse increased risk inherent in horse behaving as horse); *Souza v Squaw Valley Ski Corp.* (2006) 138 CA4th 262, 41 CR3d 389 (skiing into clearly visible snow-making hydrant was inherent risk of skiing, even for 8-year-old); *Nemarnik v Los Angeles Kings Hockey Club* (2002) 103 CA4th 631, 127 CR2d 10 (being hit by puck during warm-up was risk inherent in hockey game attendance; club owed no duty to prevent other patrons from blocking view of oncoming puck); *American Golf Corp. v Superior Court* (2000) 79 CA4th 30, 93 CR2d 683 (golfer hit by ball that bounced off yardage marker); *Record v Reason* (1999) 73 CA4th 472, 86 CR2d 547 (driver of motorboat towing rider in inner tube over water did not raise risks inherent in the sport by traveling five to ten miles per hour faster than recommended speed); *Domenghini v Evans* (1998) 61 CA4th 118, 70 CR2d 917 (being hit by struggling calf during "sporting" cattle roundup); *Mosca v Lichtenwalter* (1997) 58 CA4th 551, 68 CR2d 58 (being hit in eye by sinker on other fisherman's line was risk inherent in sport fishing); *Dilger v Moyles* (1997) 54 CA4th 1452, 63 CR2d 591 (being hit by errant ball was inherent risk of golf; other player's failure to shout "fore" not so reckless as to obviate complete defense); *Staten v Superior Court* (1996) 45 CA4th 1628, 53 CR2d 657 (being cut on arm by other skater's skate was risk inherent in figure skating; contrary expert opinion testimony not relevant because it is for court to decide presence or absence of duty); *Regents of Univ. of Cal. v Superior Court* (1996) 41 CA4th 1040, 48 CR2d 922 (giving way of anchor system was risk inherent in rock climbing, even during "commercial" class; unlike hunting, no "special danger" that would negate primary assumption of risk); *Connolly v Mammoth Mountain Ski Area* (1995) 39 CA4th 8, 45 CR2d 855 (collision with lift tower is risk inherent in snow skiing; resort not liable for failing to pad towers adequately); *Ferrari v Grand Canyon Dories* (1995) 32 CA4th 248, 38 CR2d 65 (rafting company had no duty to protect passenger from hitting head on metal frame when raft moved violently in rapids); *O'Donoghue v Bear Mountain Ski Resort* (1994) 30 CA4th 188, 35 CR2d 467 (encountering hazardous terrain is inherent risk of skiing); *Stimson v Carlson* (1992) 11 CA4th 1201, 14 CR2d 670 (swinging boom is inherent risk of sailing). See also *Calhoon v Lewis* (2000) 81 CA4th 108, 96 CR2d 394 (homeowner who built planter box containing metal pipe near driveway had no duty to make driveway safe for skateboarding; further, pipe in box did not increase risk son's friend would fall, only severity of injury suffered; and see "Note," below).

Cases using the broader analysis, but concluding that the primary assumption of risk defense did not apply, include *Luna v Vela* (2008) 169 CA4th 102, 86 CR3d 588 (child injured when he tripped over volleyball net support line in homeowner's front yard); *Cohen v Five Brooks Stable* (2008) 159 CA4th 1476, 1484, 72 CR3d 471 (fact question whether trail ride leader's conduct increased risk beyond inherent risk in horseback riding); *Capri v L.A. Fitness Int'l, LLC* (2006) 136 CA4th 1078, 39 CR3d 425 (slippery algae growing on swimming pool deck not a risk inherent in swimming; complete defense inapplicable; also noted in §1.54); *Mammoth Mountain Ski Area v Graham* (2006) 135 CA4th 1367, 38 CR3d 422 (engaging in snowball fight while descending hill was sufficiently reckless to negate defense); *Sanchez v Hillerich & Bradsby Co.* (2002) 104 CA4th 703, 128 CR2d 529 (defendants made and supplied new kind of aluminum baseball bat that increased risks inherent in college baseball); *Saffro v Elite Racing, Inc.* (2002) 98 CA4th 173, 119 CR2d 497 (marathon race organizer that failed to provide adequate water and electrolytes along route breached duty to take reasonable steps to minimize risks); *Solis v Kirkwood Resort Co.* (2001) 94 CA4th 354, 364, 114 CR2d 265 (resort operator that placed jumps, for later race, on ski run could be liable for increasing inherent risk); *Campbell v Derylo* (1999) 75 CA4th 823, 89 CR2d 519 (snowboarder who did not attach board to self with retention strap required by county ordinance liable to skier hit by runaway board); *Van Dyke v S.K.I. Ltd.* (1998) 67 CA4th 1310, 79 CR2d 775 (resort owners increased risk inherent in skiing by placing difficult-to-see, inadequately

padded signpost in ski run; *Connolly v Mammoth Mountain Ski Area, supra,* distinguished); *Lowe v California League of Professional Baseball* (1997) 56 CA4th 112, 65 CR2d 105 (antics of team mascot, distracting attention of patron who was then hit by foul ball, negated complete defense); *Branco v Kearny Moto Park, Inc.* (1995) 37 CA4th 184, 43 CR2d 392 (bicycle motocross course's use of exceptionally dangerous jump increased risks above those inherent in sport); *Freeman v Hale* (1994) 30 CA4th 1388, 36 CR2d 418 (colliding with other skiers is inherent risk of skiing, but proof that other skier's drinking increased risk of his colliding with plaintiff negated defense); *Yancey v Superior Court* (1994) 28 CA4th 558, 33 CR2d 777 (not inherent in discus throwing in physical education class that coparticipant would throw discus while plaintiff was retrieving her discus from target area); *Randall v Mammoth Mountain Ski Area* (ED Cal 1999) 63 F Supp 2d 1251 (ski resort's building of nonobvious, atypical "snow walls" increased risk inherent in skiing; distinguishing *Fortier v Los Rios Community College Dist.* (1996) 45 CA4th 430, 52 CR2d 812); *Marquez v Mainframe* (1996) 42 CA4th 881, 50 CR2d 34, noted in §6.23.

NOTE: Proving that a coparticipant's conduct increased the risk inherent in a recreational activity may convert the plaintiff's assumption of risk from primary to secondary. See §1.47. But proof that a nonparticipant's conduct raised the risk does not, by itself, establish that the nonparticipant breached a duty of care owed to the plaintiff. See *Parsons v Crown Disposal Co.* (1997) 15 C4th 456, 480, 63 CR2d 291 (ordinarily noisy garbage truck operation breached no duty owed to equestrian on nearby trail); *Calhoon v Lewis* (2000) 81 CA4th 108, 96 CR2d 394 (homeowner who built planter box was not coparticipant with son's friend who fell while skateboarding in driveway).

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§1.52 (6) Effect of Violating Statute or Ordinance

A statute or local ordinance that states guidelines for conduct in pursuing an activity may impose a duty on a participant that would supersede application of the primary assumption of risk defense. See *Huff v Wilkins* (2006) 138 CA4th 732, 740, 41 CR3d 754 (statute and rules requiring all-terrain vehicle driver to be over 18 years of age, to ride with adult supervision, and to have taken safety training program negated application of defense against plaintiff ATV driver injured by unsupervised, untrained 14-year-old); *Campbell v Derylo* (1999) 75 CA4th 823, 89 CR2d 519 (snowboarder who did not attach board to self with retention strap required by county ordinance liable to skier hit by runaway board). But see *Whelihan v Espinoza* (2003) 110 CA4th 1566, 2 CR3d 883 (statutes regulating use and operation of jet skis did not abrogate primary assumption of risk defense in suit by jet ski driver against other driver in collision); *Moser v Ratinoff* (2003) 105 CA4th 1211, 1220, 130 CR2d 198 ("organized, noncompetitive, long-distance bicycle ride" is "sport" to which defense applies; defense not abrogated by allegations that defendant bicyclist violated rules of road in Vehicle Code); *Distefano v Forester* (2001) 85 CA4th 1249, 1277, 102 CR2d 813 (full defense applied despite contention that off-road vehicle driver violated Veh C §38305, which prohibits driving off-road vehicle at greater than "reasonable and prudent" speed; fast and aggressive driving deemed "inevitable" in off-roading and imposing tort liability for violating section would "chill or deter" vigorous participation). See discussion in *Cheong v Antablin* (1997) 16 C4th 1063, 1069, 68 CR2d 859, a skier collision case, in which the court concluded, however, that the Placer County Skier Responsibility Code (Placer Code §§9.28.010-9.28.090) did not, under the facts, negate a complete defense. See also *Parsons v Crown Disposal Co.* (1997) 15 C4th 456, 484, 63 CR2d 291, noted above.

The general duty imposed on school personnel to supervise the activities of students, does not negate application of the primary assumption of risk defense as a complete bar to recovery by students injured while participating in school-sponsored recreational or sports activities. See §1.29. See generally Evid C §669 (negligence per se, discussed in §1.31). See also CACI 408 (2003); BAJI 4.70 (9th ed 2002) (reckless misconduct of sports coparticipant).

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§1.53 (7) Federal Causes of Action

Federal maritime law does not recognize assumption of risk as a defense that entirely bars a plaintiff's recovery. *Barber v Marina Sailing, Inc.* (1995) 36 CA4th 558, 42 CR2d 697 (plaintiff injured as pleasure boat was leaving dock could sue skipper, owner, charterer, and sailing club); *Manning v Gordon* (ND Cal 1994) 853 F Supp 1187 (damage to yacht in collision during race). Similarly, the Federal Employers' Liability Act (45 USC §§51-60) does not permit an employer to raise an assumption of risk defense. *Jenkins v Union Pac. R.R.* (9th Cir 1994) 22 F3d 206, 210.

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Source: Torts/California Tort Guide/1 General Principles/§1.54 b. Express Assumption of Risk: Exculpatory Agreements; Pre-Injury Releases

§1.54 b. Express Assumption of Risk: Exculpatory Agreements; Pre-Injury Releases

A defendant may assert, as a complete defense, that the plaintiff, before being injured, became bound by an "exculpatory agreement," an agreement that one party will not be liable for future injury to the other caused by its negligence.

NOTE: "Exculpatory agreement" is a general term that includes contract provisions or documents intended to relieve a defendant from liability for prospective negligence or other wrongful conduct, including those titled "release [from liability]," "waiver of liability," "assumption of risk," and the like. This section does not discuss the "release" commonly signed by a plaintiff to settle all or part of a lawsuit for an injury that has already occurred.

See *Platzer v Mammoth Mountain Ski Area* (2002) 104 CA4th 1253, 128 CR2d 885 (even though a common carrier of persons for reward (see §§5.6-5.17), ski lift operator exonerated from liability for ordinary negligence alleged to have caused injury to child in fall from chairlift; gross negligence not proved); *Lund v Bally's Aerobic Plus, Inc.* (2000) 78 CA4th 733, 93 CR2d 169 ("waiver and release" clause in membership agreement effective to exonerate health club from liability for employee's negligent advice on use of exercise machine); *Sanchez v Bally's Total Fitness Corp.* (1998) 68 CA4th 62, 79 CR2d 902 (clause in fitness center membership application that used such phrases as "sole risk," "center shall not be liable," and "hold harmless" provided complete defense although clause did not include "negligence"); *Aaris v Las Virgenes Unified Sch. Dist.* (1998) 64 CA4th 1112, 1120, 75 CR2d 801 ("activity certificate" signed by parent provided complete defense to suit by child injured during cheerleading practice); *Allan v Snow Summit, Inc.* (1996) 51 CA4th 1358, 59 CR2d 813 (release form signed by skier provided ski area with full defense even against claim that instructor's conduct had increased risk); *Allabach v Santa Clara County Fair Ass'n* (1996) 46 CA4th 1007, 1015, 54 CR2d 330 (document spectator signed to gain entry to auto race pit area provided track owner full defense to suit alleging injury when car hit defective barrier); *Paralift, Inc. v Superior Court* (1993) 23 CA4th 748, 29 CR2d 177 (skydiver's pre-injury release of defendants from liability for active or passive negligence, signed years earlier at another locale, barred wrongful death lawsuit). See also *Knight v Jewett* (1992) 3 C4th 296, 308 n4, 11 CR2d 2 (express assumption of risk through signing agreement is analogous to primary assumption of risk); *Saenz v Whitewater Voyages, Inc.* (1990) 226 CA3d 758, 764, 276 CR 672 (express assumption occurs when plaintiff, in advance, expressly agrees to "take his chances of injury from what the defendant is to do or leave undone").

An exculpatory agreement relating to recreational activities that purports to release liability for future gross negligence violates public policy and is unenforceable and ineffective. *City of Santa Barbara v Superior Court* (*Janeway)* (2007) 41 C4th 747, 750, 62 CR3d 527 (permitting disabled child, who was subject to seizures, to dive into deep end of crowded public pool without close supervision could amount to gross negligence not covered by release from liability for "any negligent act").

A purported exculpatory clause does not provide a defense if it is too inconspicuous (as when it is contained in an untitled paragraph, undifferentiated by typeface or size from other parts of a lengthy document printed in small type), if its terms are ambiguous or misleading, if it does not clearly and explicitly express the parties' intent to insulate the defendant from liability, or if it cannot reasonably be read to cover the particular fault that caused the plaintiff's injury. See *Cohen v Five Brooks Stable* (2008) 159 CA4th 1476, 1484, 72 CR3d 471 (negligence that increased the inherent risk in horseback riding not unambiguously covered by agreement); *Zipusch v LA Workout, Inc.* (2007) 155 CA4th 1281, 1287, 66 CR3d 704 (clause in membership agreement did not state that health club would be exculpated from liability for its own negligence; ambiguity construed against drafter); *Solis v Kirkwood Resort Co.* (2001) 94 CA4th 354, 360, 114 CR2d 265 (exculpatory clause in plaintiff's midweek ski pass, not in day-pass under which plaintiff was skiing on Sunday, did not necessarily protect resort owner); *Leon v Family Fitness Ctr. (#107), Inc.* (1998) 61 CA4th 1227, 71 CR2d 923 (assumption of risk and general release statements in fitness center's retail installment contract provided no defense to suit for injury sustained when sauna bench collapsed); *Bennett v United States Cycling Ass'n* (1987) 193 CA3d 1485, 1490, 239 CR 55 (terms must show that parties intended agreement to apply to particular conduct that caused harm). But see *Benedek v PLC Santa Monica, LLC* (2002) 104 CA4th 1351, 1358, 129 CR2d 197 ("waiver of

liability" for on-premises injury "whether using exercise equipment or not" clearly and unambiguously exonerated defendant from liability for injury caused by falling TV set as plaintiff prepared to use equipment); *Sanchez v Bally's Total Fitness Corp.* (1998) 68 CA4th 62, 79 CR2d 902 (exculpatory clause in membership application provided complete defense although not printed in highlighted or differentiated type).

The circumstances under which a release is executed can give rise to an ambiguity (about the extent of its coverage) that is not apparent on the face of the release, and such ambiguity is normally construed against the drafter. *Sweat v Big Time Auto Racing, Inc.* (2004) 117 CA4th 1301, 1306, 12 CR3d 678 (race patron injured when bleachers collapsed).

Under CC §1668:

> All contracts which have for their object, directly or indirectly, to exempt anyone from responsibility for his own fraud, or willful injury to … another, or violation of law, whether willful or negligent, are against the policy of the law.

Thus, an exculpatory agreement provides no defense to fraud or intentional tort claims. *Baker Pac. Corn v Suttles* (1990) 220 CA3d 1148, 1154, 269 CR 709; *Blankenheim v E.F. Hutton & Co.* (1990) 217 CA3d 1463, 1471, 266 CR 593 (negligent misrepresentation as species of fraud); *McQuirk v Donnelly* (9th Cir 1999) 189 F3d 793 (defamation). See *Farnheim v Superior Court* (1997) 60 CA4th 69, 70 CR2d 85 (waiver of right to sue employees with right to sue employer retained).

Further, under CC §1668, an exculpatory agreement is no defense to allegations that injury resulted from a defendant's violation of a statute. *Capri v L.A. Fitness Int'l, LLC* (2006) 136 CA4th 1078, 39 CR3d 425 (alleged violation of Health & S C provisions on swimming pool maintenance); *Health Net of Cal., Inc. v Department of Health Servs.* (2003) 113 CA4th 224, 232, 6 CR3d 235 (CC §1668 invalidates exculpatory clause that purports to exculpate from liability for statutory violations or conduct that affects public interest).

Under CC §1668, exculpatory agreements that are against public policy are invalid. See *Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 517, 143 CR 247 (lease clause purported to relieve landlord of duty to use care to prevent harm to tenant); *Tunkl v Regents of Univ. of Cal.* (1963) 60 C2d 92, 101, 32 CR 33, 39 (agreement signed by patient before treatment purported to relieve hospital and physicians from liability for negligence); *Gavin W. v YMCA of Metro. Los Angeles* (2003) 106 CA4th 662, 131 CR2d 168 (given the importance to California families of quality child care services and fact that demand greatly exceeds supply, contracts for such services are "affected with a public interest," and clause in such contract purporting to exculpate provider from own negligence is against public policy and void). But see *CAZA Drilling (Cal.), Inc. v TEG Oil & Gas USA, Inc.* (2006) 142 CA4th 453, 48 CR3d 271 (wellfield operator's agreement to be responsible for loss and harm incurred during drilling operation not rendered invalid by CC §1668 when no statute violated and public interest not affected).

Factors tending to show that a defendant's activity affects a public interest, so that no agreement or express assumption of risk will relieve the defendant from liability for negligence or other wrongful conduct, include the following:

(1) The type of business engaged in by the defendant is suitable for public regulation;
(2) The defendant's service is of great importance to the public (or to some members of the public);
(3) The defendant makes its service available to the general public;
(4) The defendant has superior bargaining power in the transaction;
(5) The defendant will do business in the absence of a release clause for additional consideration; and
(6) The plaintiff was subjected to the defendant's control.

See *Guido v Koopman* (1991) 1 CA4th 837, 841, 2 CR2d 437. See also *Tunkl v Regents of Univ. of Cal.* (1963) 60 C2d 92, 98, 32 CR 33; *YMCA of Metropolitan Los Angeles v Superior Court* (1997) 55 CA4th 22, 63 CR2d 612.

Activities not within the "public interest" category include such recreational activities as horseback riding, bicycle or motorcycle racing, whitewater rafting, scuba diving, and skydiving. *Guido v Koopman, supra* (riding stable's preinjury release was valid). See *Booth v Santa Barbara Biplane Tours, LLC* (2008) 158 CA4th 1173, 1178, 70 CR3d 660 (sightseeing flight); *YMCA of Metropolitan Los Angeles v Superior Court, supra* (program for seniors involving socializing, shopping, and low-cost lunch not an "essential" activity; see §10.43; absence of alternative programs from other providers no reason to invalidate release); *Buchan v United States Cycling Fed'n* (1991) 227 CA3d 134, 277 CR 887 (bicycle racing not sufficiently affected by public interest to void clear and unambiguous exculpatory clause); *Hulsey*

v Elsinore Parachute Ctr. (1985) 168 CA3d 333, 214 CR 194 ("clear and explicit" release for parachute jumping upheld).

An exculpatory agreement that does not specifically mention negligence does not excuse a defendant's "active" or "affirmative" negligence, although it may excuse "passive" negligence. *Philippine Airlines, Inc. v McDonnell Douglas Corp.* (1987) 189 CA3d 234, 237, 234 CR 423. See *Burnett v Chimney Sweep, LLC* (2004) 123 CA4th 1057, 1066, 20 CR3d 562 (exculpatory clause in lease did not necessarily exempt lessor from liability resulting active negligence in refusing to remediate problems caused by excessive moisture and mold). See also *Farina v Mt. Bachelor, Inc.* (9th Cir 1995) 66 F3d 233 (under Oregon law, agreement purporting to exonerate for gross negligence or willful misconduct held wholly invalid).

In addition, an agreement that negates a defendant's liability for negligence does not necessarily exonerate the defendant from strict product liability. See *Westlye v Look Sports, Inc.* (1993) 17 CA4th 1715, 1741, 22 CR2d 781 (signing agreement with sport shop to accept ski equipment "as is" exonerated neither shop nor distributor from strict product liability; see §11.43). Releases from liability as a condition for purchasing, renting, or obtaining service on ski bindings that do not expressly purport to preclude strict product liability can be valid; they do not violate unfair competition laws or the Consumers Legal Remedies Act (CC §§1750-1784). *Olsen v Breeze, Inc.* (1996) 48 CA4th 608, 618, 55 CR2d 818.

A minor may not be bound by an exculpatory agreement that is not signed by a parent. See discussion in *Hohe v San Diego Unified Sch. Dist.* (1990) 224 CA3d 1559, 274 CR 647 (15-year-old and parent both signed preinjury release to allow minor to participate in hypnotism show).

Whether an exculpatory agreement signed by a decedent can bar a wrongful death recovery by heirs depends on the circumstances and the terms of the agreement. Compare *Scroggs v Coast Community College Dist.* (1987) 193 CA3d 1399, 239 CR 916 (scuba diving release not binding on decedent's wife in action against college and class instructor), with *Coates v Newhall Land & Farming, Inc.* (1987) 191 CA3d 1, 236 CR 181 (dirt biker's contractual assumption of risk before injury relieved defendants of legal duty to rider and "authorized" alleged negligent conduct; thus their conduct was not wrongful and could not be basis of wrongful death action).

See generally Ryan and Ballantine, *Health Club Releases—How to Get Around Them,* 36 CAOC Forum No. 5, p 35 (Consumer Attorneys of California), June 2006.

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Source: Torts/California Tort Guide/1 General Principles/§1.55 c. Firefighter's Rule

§1.55 c. Firefighter's Rule

A defendant whose negligence created the occasion for response by a publicly employed firefighter, peace officer, or paramedic ("emergency medical personnel") can invoke the "firefighter's rule" as a complete defense to the public employee's personal injury lawsuit unless the injury situation comes within an exception to the rule. CC §1714.9; *Lipson v Superior Court* (1982) 31 C3d 362, 376, 182 CR 629 (rule relieves defendant from usual obligation of due care with respect to conduct that caused the fire or incident, and provides complete defense even if fire occurred while defendant was conducting ultrahazardous activity). See *City of Oceanside v Superior Court* (2000) 81 CA4th 269, 96 CR2d 621 (rule provided complete defense to public entity, and its employees, from damages liability to injured lifeguard employed by different public entity); *Tilley v Schulte* (1999) 70 CA4th 79, 82 CR2d 497 (rule bars police office shot by assailant from recovering damages from psychiatrist who treated assailant); *Baker v Superior Court* (1982) 129 CA3d 710, 721, 181 CR 311 (firefighter's assumption of risk is type that negates defendant's duty of care).

The rule does not apply to a defendant whose fault was independent from the occasion for the firefighter or officer being at the scene where the injury occurred. CC §1714.9(e); *Terry v Garcia* (2003) 109 CA4th 245, 134 CR2d 565 (CHP officer driving fast while responding to domestic violence call not barred from suing other driver that hit his car; cause of injury was independent from reason officer was on road); *Stapper v GMI Holdings, Inc.* (1999) 73 CA4th 787, 792, 86 CR2d 688 (after arriving at fire, firefighter's injury (and another's death) resulted from being trapped when garage door opener malfunctioned); *Vasquez v North County Transit Dist.* (9th Cir 2002) 292 F3d 1049, 1055 (stuck railroad crossing gate was occasion for officer's presence; cause of gate's falling on him, faulty bolts, was independent; see §12.9). See also *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 34 CR2d 630 (private safety employees not barred); *Marquez v Mainframe* (1996) 42 CA4th 881, 50 CR2d 34 (firefighter's rule not applicable to private security guard).

NOTE: A court of appeal has upheld a summary judgment based, in part, on the firefighter's rule defense despite the contention that a training course instructor's negligence occurred while the injured peace officer was participating in required training in unarmed defensive tactics (*i.e.,* defendant's alleged negligence was not "occasion" for officer's presence). See *Hamilton v Martinelli & Assocs.* (2003) 110 CA4th 1012, 2 CR3d 168 (also noted in §§1.46, 1.49).

The firefighter's rule defense relates to absence of duty and thus is waived by a pretrial stipulation that issues in the case are restricted to injury, damages, and causation. *Assad v Southern Pac. Transp. Co.* (1996) 42 CA4th 1609, 1615, 50 CR2d 443.

Under CC §1714.9, situations in which the firefighter, officer, or paramedic is not barred from recovering damages include the following:

- The injury-causing conduct occurred *after* the defendant knew, or should have known, that the person was present at the scene;
- The defendant intended to injure the person; or
- The injury-causing conduct was criminal arson.

See *Boon v Rivera* (2000) 80 CA4th 1322, 1328 n3, 96 CR2d 276 (police officer shot by man barricaded in house not barred from suing man's wife, who told officer after he arrived at scene that man was not violent and, falsely, that she did not know what guns were in house). At least the first exception (for conduct occurring after the tortfeasor knew the public employee was present) does not apply, however, when the tortfeasor is a peace officer employed by another public entity. *Calatayud v State* (1998) 18 C4th 1057, 77 CR2d 202 (firefighter's rule immunized negligent officers and their employer, the state); *McElroy v State* (2002) 100 CA4th 546, 122 CR2d 612 (rule immunized state from liability to city police officers injured in collision with CHP car as both joined in a pursuit); *Farnam v State* (2000) 84 CA4th 1448, 101 CR2d 642 (firefighter's rule immunized state when CHP officer's dog bit city police officer). See Anno, 25 ALR5th 97 (1994) (application of firefighter's rule when peace officer injured by person resisting arrest).

NOTE: *Calatayud* and its progeny seem to say that publicly employed officers cannot recover damages when injured by

the conduct of officers employed by a different public entity engaged in a joint activity even if the negligence occurred after the injured officers were known to be present at the scene. An application of the firefighter's-rule defense more consistent with the policies underlying it would exonerate negligent officers only for conduct that drew the injured officers to the scene.

For examples of application of the firefighter's rule in particular situations, see §§4.79 (motor vehicle accidents), 6.23 (construction sites), 10.19-10.23 (premises liability).

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§1.56 3. Failure to Mitigate Damages

Plaintiff's failure to mitigate or minimize the damages caused by a defendant is a defense separate from contributory negligence. *LeMons v Regents of Univ. of Cal.* (1978) 21 C3d 869, 874, 148 CR 355 (contributory negligence occurs before plaintiff is injured: failure to mitigate is lack of due care after injury).

A plaintiff's failure to mitigate damages has been held to bar the recovery of damages for loss or harm that would have been avoided by plaintiff's use of ordinary care *after* the injury. *LeMons v Regents of Univ. of Cal., supra* (error to instruct on contributory negligence when evidence showed only failure to mitigate). (*Note:* Yet to be decided is whether the advent of comparative fault (see §1.41) may call for a comparative reduction of damages rather than a bar.)

A plaintiff's failure to mitigate damages can be shown by evidence that the plaintiff received insurance payments but failed to make prompt repairs. See *Blake v E. Thompson Petroleum Repair Co.* (1985) 170 CA3d 823, 216 CR 568.

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III. WILLFUL MISCONDUCT

§1.57 A. Definition; Elements; Effect of Finding

Willful misconduct (which also carries such interchangeable names as "wanton misconduct," "serious and willful misconduct," "reckless (or wanton) disregard of another's safety," and "recklessness") includes (1) intentionally acting with knowledge (actual or implied) that serious injury will be the probable (as distinguished from possible) result, or (2) intentionally acting with wanton and reckless disregard of the consequences. *Ewing v Cloverleaf Bowl* (1978) 20 C3d 389, 402, 143 CR 13; *Williams v Carr* (1968) 68 C2d 579, 584, 68 CR 305, 309.

Regardless of the actual state of the actor's mind or his actual concern for others' rights, his conduct may be called willful if it is sufficiently lacking in consideration for the rights of others, reckless, heedless to an extreme, and indifferent to the consequences it may cause. See *Ewing v Cloverleaf Bowl, supra*. See also *New v Consolidated Rock Prods. Co.* (1985) 171 CA3d 681, 217 CR 522 (willful misconduct based on finding that reasonable person would be aware that certain conduct was dangerous; defendant's actual state of mind irrelevant).

Three essential elements that raise a negligent act to the level of willful misconduct are (1) actual or constructive knowledge of the peril, (2) actual or constructive knowledge that injury will be a probable (as opposed to possible) result of the danger, and (3) conscious failure to avoid the peril. *Morgan v Southern Pac. Transp. Co.* (1974) 37 CA3d 1006, 1012, 112 CR 695. Intent to injure is not an essential element of willful misconduct. See *Colson v Standard Oil Co.* (1976) 60 CA3d 913, 916, 131 CR 895.

Before California adopted a comparative fault system (see §1.41), courts treated willful misconduct as an aggravated form of fault that differed in quality, not just degree, from ordinary negligence. See *Reuther v Viall* (1965) 62 C2d 470, 475, 42 CR 456, 459 (question of fact whether party guilty of willful misconduct); *Morgan v Southern Pac. Transp. Co.* (1974) 37 CA3d 1006, 1011, 112 CR 695 (plaintiff entitled to instructions defining willful misconduct). A plaintiff could allege willful misconduct as a theory of recovery separate from ordinary negligence. See Restatement (Second) of Torts §§282 comment e, 500-503 (1965). See also *Lostritto v Southern Pac. Transp. Co.* (1977) 73 CA3d 737, 744, 140 CR 905 (evidence, direct and circumstantial, supported verdict finding willful misconduct). Further, defenses that were good against a negligence cause of action were not good against willful misconduct. See §§1.58-1.59.

Under comparative fault, courts have treated willful misconduct as a form of fault that differs in degree, but not in kind or quality, from negligence. See *Zavala v Regents of Univ. of Cal.* (1981) 125 CA3d 646, 650, 178 CR 185; *Southern Pac. Transp. Co. v State* (1981) 115 CA3d 116, 121, 171 CR 187; *Sorensen v Allred* (1980) 112 CA3d 717, 723, 169 CR 441. A defendant who was guilty of willful misconduct lost the comparative negligence defense. See §1.58. See §1.45 on a plaintiff's contributory willful misconduct.

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B. Defenses to Willful Misconduct Claims

§1.58 1. Contributory Negligence

Under California's present comparative fault system (see §1.41), the damages of a plaintiff whose own negligence contributed to causing his injury are diminished in proportion to his fault even when the defendant was guilty of willful misconduct. *Sorensen v Allred* (1980) 112 CA3d 717, 169 CR 441 (negligence and willful misconduct should be treated as different degrees of same kind of fault, rather than as two species that differ in quality).

Before the adoption of comparative fault, a plaintiff's contributory negligence neither barred nor diminished recovery from a defendant found guilty of willful misconduct. See *Ewing v Cloverleaf Bowl* (1978) 20 C3d 389, 401, 143 CR 13; *Williams v Carr* (1968) 68 C2d 579, 583, 68 CR 305, 309.

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§1.59 2. Contributory Willful Misconduct

Under California's present comparative fault system (see §1.41), cases discussing a plaintiff's contributory willful misconduct (see §1.45) support the view that a plaintiff's willful misconduct does not bar recovery from a defendant who was also guilty of willful misconduct. See §1.45. In this view, the conduct of both parties would be compared and plaintiff's damages reduced in proportion to the extent that his fault caused his injuries and loss. See *Zavala v Regents of Univ. of Cal.* (1981) 125 CA3d 646, 178 CR 185; *Southern Pac. Transp. Co. v State* (1981) 115 CA3d 116, 171 CR 187.

Before the adoption of comparative fault, plaintiffs who were guilty of willful misconduct were barred from recovering from defendants who were guilty of willful misconduct, negligence, or both. See *Ewing v Cloverleaf Bowl* (1978) 20 C3d 389, 401, 143 CR 13; *Cawog v Rothbaum* (1958) 165 CA2d 577, 591, 331 P2d 1063. See also *Lostritto v Southern Pac. Transp. Co.* (1977) 73 CA3d 737, 745, 140 CR 905; Restatement (Second) of Torts §482(2) (1965) (a plaintiff whose conduct is in reckless disregard of his own safety is barred from recovery against a defendant whose reckless disregard of plaintiff's safety is a legal cause of plaintiff's harm).

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§1.60 3. Assumption of Risk

Under California's comparative fault system (see §1.41), it appears that the degree of legal fault involved in the plaintiff's secondary assumption of risk (see §1.43) is compared with the degree of fault involved in the defendant's willful misconduct (and negligence) to determine the percentage, if any, by which plaintiff's damages must be diminished. See §1.58.

If the defendant's willful misconduct amounts to an intent to injure or is "so reckless as to be totally outside the range of the ordinary activity involved in the sport," the plaintiff's voluntary participation in the sport or activity (*i.e.,* a plaintiff's primary assumption of risk) does not bar the plaintiff's recovery. See §§1.46-1.53. (*Note:* In such cases, it may be that neither secondary nor primary assumption of risk will result in even a comparative reduction of damages.)

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§1.61 C. Punitive Damages

Proving that a defendant's breach of duty amounted to willful misconduct does not always establish entitlement to punitive damages. To recover punitive damages, a plaintiff must prove by clear and convincing evidence that the defendant was guilty of malice, which is (1) conduct intended by the defendant to cause injury to the plaintiff or (2) "despicable conduct" carried on with a "willful and conscious disregard of the rights or safety of others." CC §3294(c)(1); *Sumpter v Matteson* (2008) 158 CA4th 928, 935, 70 CR3d 495 (despite substantial evidence that defendant drove with conscious disregard of others' safety, jury could find he acted without malice and deny punitive damages).

For a comprehensive discussion of the prerequisites for recovering punitive damages, see California Tort Damages, chap 14 (2d ed Cal CEB 2002).

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IV. COMPARATIVE INDEMNITY

§1.62 A. Defendants' Claims Against Cotortfeasors

The comparative fault system (see §1.41) seeks to impose liability on tortfeasors in proportion to the percentage of causative fault assigned by the trier of fact to each of them. The joint and several judgment rule, however, may require a defendant to pay more than his or her proportional share of the plaintiff's economic damages. The comparative indemnity principle permits such a defendant to obtain judgments against other concurrently responsible persons who have not paid their proportional share of such damages. *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 146 CR 182 (joint and several judgment rule retained; equitable indemnity doctrine modified to embody comparative fault principles). See *Safeway Stores, Inc. v Nest-Kart* (1978) 21 C3d 322, 146 CR 550 (comparative indemnity apportionment between negligent and strictly liable defendants).

NOTE: Under Proposition 51 (CC §§1431.2), comparative indemnity principles apply only to economic damages. Comparative indemnity has also been called "equitable," "partial," or "implied" indemnity.

Comparative indemnity may be pursued by cross-complaining against other persons whose fault caused plaintiff's loss, even if the plaintiff did not name them as defendants. *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 607, 146 CR 182 (cross-complaint against minor plaintiff's parents); *Sears, Roebuck & Co. v International Harvester Co.* (1978) 82 CA3d 492, 147 CR 262 (defendant may pursue cross-complaint even after settling main action with plaintiff). A cross-complaint for comparative equitable indemnity seeks legal relief for which the cross-defendant is entitled to a jury trial. *Martin v County of Los Angeles* (1996) 51 CA4th 688, 59 CR2d 303 (jury assignment of fault percentage to cross-defendant collaterally estopped judge from assigning higher percentage for indemnity purposes). A defendant to whom the trier of fact assigns a fault percentage of zero has no implied indemnity claim against a co-defendant and thus cannot recover costs of defense or an attorney fee from that codefendant. See *Watson v Department of Transp.* (1998) 68 CA4th 885, 892, 80 CR2d 594.

A defendant's right to comparative indemnity is distinct from the right, in certain cases, to full indemnity, on an all-or-nothing basis, under a contract (express indemnity) or under the doctrine of equitable (or implied) indemnity based on the relationship between the defendant and the other person. See *E.L. White, Inc. v City of Huntington Beach* (1978) 21 C3d 497, 506, 146 CR 614. See generally §§6.26, 8.8, 9.83, 11.40.

Proposition 51 limits a settling defendant's indemnity recovery from a nonsettling defendant to a percentage (the nonsettling defendant's "percentage of fault") of the portion of the settlement that was for the injured person's economic damages. See *Union Pac. Corp. v Wengert* (2000) 79 CA4th 1444, 95 CR2d 68 (settling defendants should not be deemed to have paid anything to cover nonsettling defendant's several liability for noneconomic damages). See §1.69.

Statutes that may affect a defendant's right to recover comparative indemnity include Lab C §4558(d), discussed in *E.W. Bliss Co. v Superior Court* (1989) 210 CA3d 1254, 258 CR 783 (manufacturer's right of indemnity and contribution when employee injured by employer's removal of, or failure to install, safety guard on power press). See §9.85 on comparative indemnity in medical malpractice cases.

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. See *Miller v Ellis* (2002) 103 CA4th 373, 382, 126 CR2d 667.

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B. Particular Situations

§1.63 1. Successive Tortfeasors

A tortfeasor who caused the plaintiff's original injury is liable for additional injury suffered by the plaintiff during, for example, negligent medical treatment of the original injury. See *Anaya v Superior Court* (2000) 78 CA4th 971, 973, 93 CR2d 228 (discussed in §1.17; driver whose alleged negligence caused vehicle collision in which passenger was injured liable for death of passenger in later crash, possibly due to product defect, of helicopter taking her to medical facility). The first tortfeasor may seek indemnity from the second, who should be liable only for the additional harm or loss resulting from the latter's fault. There are situations, however, in which the indemnity that the first tortfeasor may recover from the second is based on a comparison of the fault of the first to the fault of the second, rather than a comparison of the amount of injury caused by each. See *Blecker v Wolbart* (1985) 167 CA3d 1195, 213 CR 781 (comparative indemnity does not alter rule that original tortfeasor's negligence is proximate cause of plaintiff's further injuries from medical malpractice).

An attorney sued by a client for legal malpractice may sometimes pursue a comparative indemnity claim against a "concurrent counsel" or "co-counsel." See *Musser v Provencher* (2002) 28 C4th 274, 121 CR2d 373. The sued attorney may be precluded, however, for policy reasons from seeking indemnity from a successor attorney, although the sued attorney may raise the liability of the others to reduce his or her own fault percentage. See *Kroll & Tract v Paris & Paris* (1999) 72 CA4th 1537, 86 CR2d 78.

Expert witnesses, accused of malpractice by the clients of the attorneys who hired them to testify for the client in a wrongful death lawsuit, may seek equitable indemnification by filing cross-complaints against those attorneys. *Forensis Group, Inc. v Frantz, Townsend & Foldenauer* (2005) 130 CA4th 14, 29 CR3d 622.

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§1.64 2. Loss of Consortium

Under Proposition 51 (CC §§1431.2), a plaintiff chargeable with contributory fault, need not indemnify a defendant for loss of consortium damages paid by that defendant to the plaintiff's spouse. Loss of consortium damages are "non-economic" and the spouse's recovery would thus already have been reduced by the injured plaintiff's fault percentage. For further discussion, see latest update to California Tort Damages §2.17 (2d ed Cal CEB 2002).

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§1.65 3. Strict Liability

A defendant found to be strictly liable for injury caused by a defective product can obtain comparative indemnity from negligent cotortfeasors. *Safeway Stores, Inc. v Nest-Kart* (1978) 21 C3d 322, 146 CR 550. See *Expressions at Rancho Niguel Ass'n v Ahmanson Devs., Inc.* (2001) 86 CA4th 1135, 103 CR2d 895 (comparative indemnity, not joint and several liability principles, applied to strictly liable settling defendant's indemnity claim against nonsettling defendant); *Yamaha Motor Corp., U.S.A. v Paseman* (1990) 219 CA3d 958, 268 CR 514 (moped manufacturer, sued under theories of strict liability, negligence, and failure to warn, could seek comparative (equitable) indemnity from plaintiff's parents for parents' alleged negligence in maintaining moped and their failure to warn of defective condition caused by negligent maintenance).

On apportionment of liability among participants in the marketing chain for a defective product, see §11.40.

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§1.66 4. Willful Misconduct

A defendant whose fault was characterized as willful misconduct can, nevertheless, obtain comparative indemnity from a defendant whose fault was negligence. *Southern Pac. Transp. Co. v State* (1981) 115 CA3d 116, 171 CR 187. See *Allen v Sundean* (1982) 137 CA3d 216, 224, 186 CR 863 (defendant entitled to partial indemnity from negligent codefendant for damages attributable to defendant's willful misconduct, but not for damages attributable to defendant's intentional fraudulent concealment). See generally §§1.57-1.61.

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§1.67 C. Defenses to Comparative Indemnity Claims

If the plaintiff's injury arose out of and in the course of his or her employment, the employer, even though guilty of concurrent causative fault, need not indemnify other tortfeasors. See Lab C §3864; *American Motorcycle Ass'n v Superior Court* (1978) 20 C3d 578, 607 n9, 146 CR 182. See also §6.21.

An alleged cotortfeasor who previously entered into a good faith settlement with the plaintiff need not indemnify other tortfeasors, even if the amount paid by settlement is less than the settling party's proportional share of plaintiff's damages. See CCP §§877-877.6; *American Motorcycle Ass'n v Superior Court, supra*. See also *Far W. Fin. Corp. v D & S Co.* (1988) 46 C3d 796, 251 CR 202. A defendant who has entered into a good faith settlement with a damages claimant is prevented by CCP §877.6 from obtaining equitable comparative indemnity from later-settling defendants. See *Mid-Century Ins. Exch. v Daimler-Chrysler Corp.* (2001) 93 CA4th 310, 112 CR2d 880. The rules and procedure for determining the good faith of a settlement are covered, with forms, in California Civil Procedure Before Trial, chap 50 (4th ed Cal CEB 2004) (with latest update).

A summary judgment or other finding that a defendant has no liability to an injured plaintiff provides a complete defense to a cross-complaint for equitable indemnity. *Allis-Chalmers Corp. v Superior Court* (1985) 168 CA3d 1155, 214 CR 615. Further, a previous judgment that a defendant was not at fault precludes an equitable indemnity recovery by a party that had settled with the plaintiff in the previous lawsuit before it reached judgment. *Children's Hosp. v Sedgwick* (1996) 45 CA4th 1780, 53 CR2d 725.

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§1.68 D. Comparative Indemnity for Commercial Losses

The principles of comparative negligence and indemnity apply to tort actions, such as for negligent misrepresentation, in the commercial arena. See *Considine Co. v Shadle, Hunt & Hagar* (1986) 187 CA3d 760, 232 CR 250 (law firm could be held liable to indemnify former client for alleged negligent misrepresentations). However, when liability is strictly contractual, principles of comparative negligence will not apply. 187 CA3d at 770. See also *Baird v Jones* (1993) 21 CA4th 684, 27 CR2d 232 (fraud in sale of real property; one intentional tortfeasor entitled to comparative indemnity from other); *Gem Developers v Hallcraft Homes, Inc.* (1989) 213 CA3d 419, 261 CR 626 (entity held strictly liable entitled to comparative indemnity from other entity); *Gentry Constr. Co. v Superior Court* (1989) 212 CA3d 177, 260 CR 421 (multiple tortfeasors strictly liable to same plaintiff can seek comparative indemnity from each other and from negligent tortfeasors).

A tortfeasor cannot obtain equitable indemnity from a person or entity that is not a joint tortfeasor. See *BFGC Architects Planners v Forcum/Mackey Const. Co.* (2004) 119 CA4th 848, 14 CR3d 721 (architects sued by property owner for furnishing defective plans could not obtain equitable indemnity from contractors whose duties, if any, were separately owed to owner).

Because comparative indemnity is an equitable doctrine, courts refrain from applying it when its application is unfair. See, *e.g., Woodward-Gizienski & Assocs. v Geotechnical Exploration, Inc.* (1989) 208 CA3d 64, 255 CR 800 (condominium developers denied indemnity from soils engineers); *Jaffe v Huxley Architecture* (1988) 200 CA3d 1188, 246 CR 432 (equitable indemnification inappropriate if affirmative defense would provide equivalent relief). But see *Platt v Coldwell Banker Residential Real Estate Serv.* (1990) 217 CA3d 1439, 266 CR 601 (comparative indemnity sometimes appropriate even if liability would be apportioned under comparative fault affirmative defense).

The terms of a contract between two commercial entities may effectively bar one from seeking comparative indemnity from the other. See *Philippine Airlines, Inc. v McDonnell Douglas Corp.* (1987) 189 CA3d 234, 234 CR 423.

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§1.69 V. PROPOSITION 51 (FAIR RESPONSIBILITY ACT OF 1986)

Proposition 51 (CC §§1431-1431.5) was enacted by initiative June 3, 1986, as the Fair Responsibility Act of 1986. Civil Code §1431.2 (the key section) limits each defendant's liability for "noneconomic" damages to the amount of such damages equal to each defendant's percentage of fault in lawsuits (a) for personal injury, property damage, and wrongful death, (b) based on principles of comparative fault, and (c) accruing on or after June 4, 1986. *Evangelatos v Superior Court* (1988) 44 C3d 1188, 246 CR 629. Section 1431.2 does not appear to change each defendant's traditional joint and several liability for all "economic" damages. "Economic" and "noneconomic" are defined in CC §1431.2(b).

The date on which a cause of action for a "progressive injury" such as asbestosis or berylliosis accrues, for Proposition 51 purposes, is the date on which the condition was first discovered or diagnosed. *Buttram v Owens-Corning Fiberglas Corp.* (1997) 16 C4th 520, 66 CR2d 438. See *Arena v Owens-Corning Fiberglas Corp.* (1998) 63 CA4th 1178, 1191, 74 CR2d 580 (Proposition 51 applied in strict product liability case involving multiple suppliers; but see §11.29).

Each defendant's responsibility for noneconomic damages is determined by having the trier of fact assign a comparative fault percentage to each person whose legal fault contributed to causing the plaintiff's harm or loss, including, as applicable, each defendant, the plaintiff, the plaintiff's employer (even when the employer is immune from liability to the plaintiff for damages), and each person (whether sued or not) who settled with the plaintiff. See *DaFonte v Up-Right, Inc.* (1992) 2 C4th 593, 7 CR2d 238. Courts of appeal have prescribed the way in which a trial judge is to apply these fault percentages to (1) limit each defendant's liability for noneconomic damages, and (2) reduce the plaintiff's recovery of economic damages when (a) the trier of fact has assigned a fault percentage to the plaintiff, (b) pre-verdict settlement money has been paid to the plaintiff by "tortfeasors claimed to be liable for the same tort," or (c) the plaintiff's employer has provided workers' compensation benefits for the plaintiff's injury. See *Torres v Xomox Corp.* (1996) 49 CA4th 1, 56 CR2d 455; *Scalice v Performance Cleaning Sys.* (1996) 50 CA4th 221, 57 CR2d 711. At least one court has held that the seller of construction equipment whose employees have committed the tort of misrepresentation is not entitled to a CC §1431.2 limitation of noneconomic damages. See *Thomas v Duggins Constr. Co.* (2006) 139 CA4th 1105, 44 CR3d 66 (also noted in §6.10).

When a fault allocation made by the trier of fact to a defendant cannot be sustained, the appellate court concluding 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.

For additional discussion, see Clausen and Zimmerman, *Understanding and Evaluating Judgment Calculation Methods After Proposition 51,* 18 CEB Civ Litigation Rep 460 (Dec. 1996). See also Watson & Walsh, *How Proposition 51 Works: Its Judicial Development and Impact on Practice,* 22 CEB Civ Litigation Rep 6 (Feb. 2000); Ernst & Hawkins, *Allocation of Workers' Compensation Benefits and Post-Verdict Settlements Between "Economic" and "Non-Economic" Damages Under Proposition 51,* 28 CAOC Forum No. 4, p8 (Consumer Attorneys of California), May 1998; Weed, Casenote, *Torres v. Xomox: Allocating Worker's Compensation Benefits and Post Verdict Settlement Proceeds Under Proposition 51,* 29 McGeorge L Rev 141 (1997).

NOTE: Effects of Proposition 51 in particular situations are discussed in §§1.62 (comparative indemnity), 1.64 (loss of consortium), 2.30 (airplane crashes), 4.28 (car owner's liability), 4.45 (respondeat superior), 6.12 (peculiar risk), 6.25 (nondefendants' fault for construction injuries), 9.83 (successive medical malpractice), 9.86 (medical malpractice damages), 10.15 (nondelegable duty to maintain premises), 11.29 (product liability), and 11.46 (product liability immunities).

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Airplanes

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§2.1 I. SCOPE OF CHAPTER

This chapter does not cover actions for harm or loss caused by airplane noise and vibration near airports. See Anno, 22 ALR4th 863 (1983) (airport and aircraft operation as taking or damaging property). Nor does this chapter cover liability for the emotional distress experienced by persons on the ground who see or perceive aircraft crashes. See California Tort Damages §§6.4, 6.8, 6.25 (2d ed Cal CEB 2002). Also excluded from coverage is airline liability for overbooking and "bumping" passengers. See, *e.g., Rubin v United Airlines, Inc.* (2002) 96 CA4th 364, 117 CR2d 109 (airline not liable for ejecting passenger it reasonably believed had, or might, become inimical to airline safety; passenger became obstreperous on being told her reserved first-class seat was unavailable); *Lathigra v British Airways PLC* (9th Cir 1994) 41 F3d 535.

The liability of carriers for damage to freight and baggage is covered in §§5.19-5.21, 5.28.

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II. LIABILITY

§2.2 A. Applicability of Basic Tort Law

The same rules of tort law that determine liability for death, injury, or property damage on land and water are applied to aircraft pilots and owners. Pub Util C §§21404, 21405. See *Cummins v Sky Cruisers, Inc.* (1976) 59 CA3d 983, 985, 130 CR 897. See Annos, 12 ALR2d 677 (1950) (airplane collisions), 35 ALR3d 707 (1971) (helicopter accidents).

Aviation is not an ultrahazardous activity for which liability without fault may be imposed. See Pub Util C §§21403-21405; *Boyd v White* (1954) 128 CA2d 641, 648, 276 P2d 92, 96. See Anno, 74 ALR4th 416 (1989) (strict liability for injuries or damage on the ground from aircraft flight).

The crash of a helicopter transporting an injured person to a medical facility is not a superseding cause that exonerates the tortfeasor who caused original injury from liability for the person's death. See *Anaya v Superior Court* (2000) 78 CA4th 971, 973, 93 CR2d 228 (allegations that helicopter was negligently maintained and that its manufacturer was strictly liable for marketing defective product). See §1.18.

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§2.3 1. Res Ipsa Loquitur

If the three conditions for application of the res ipsa loquitur doctrine are satisfied (see §§1.35-1.39), the fact that an airplane has crashed raises a presumption that someone, usually the pilot, was negligent. *Newing v Cheatham* (1975) 15 C3d 351, 360, 124 CR 193 (crash into ground in clear weather, no evidence of midair collision or mechanical failure); *Ayer v Boyle* (1974) 37 CA3d 822, 828, 112 CR 636 (crash of unlicensed, uninspected antique aircraft); *Mittelman v Seifert* (1971) 17 CA3d 51, 81, 94 CR 654 (crash approaching airport, no evidence of malfunction or lack of fuel); *San Diego Gas & Elec. Co. v U.S.* (9th Cir 1949) 173 F2d 92, 94 (collision with power lines while flying too low, in violation of regulations). See Anno, 25 ALR4th 1238 (1983) (res ipsa loquitur in aviation accidents).

The res ipsa loquitur presumption is particularly useful in airplane crash cases because of the difficulty of producing direct evidence of either (1) the precise cause of the crash (*Ashland v Ling-Temco-Vought, Inc.* (9th Cir 1983) 711 F2d 1431, 1439) or (2) negligence (see *Martin Sch. of Aviation, Inc. v Bank of America* (1957) 48 C2d 689, 694, 312 P2d 251, 254). See Anno, 12 ALR2d 677, 679 (1950) (collision or near collision with other aircraft).

The element "exclusive control by the defendant" may be lacking if the cockpit was equipped with dual controls and the passenger was expected to use them at times. *Parker v James Grangers, Inc.* (1935) 4 C2d 668, 676, 52 P2d 226, 230. But res ipsa loquitur may be applied if the passenger was not a pilot. *Ayer v Boyle* (1974) 37 CA3d 822, 829, 112 CR 636.

The doctrine has been rejected in the case of a midair collision with only one pilot sued. See *Gotcher v Metcalf* (1970) 6 CA3d 96, 102, 85 CR 566. Res ipsa loquitur may apply to multiple defendants if they share responsibility for the probable cause of the accident or if they are deemed to be in "joint control" of the aircraft. *See Ashland v Ling-Temco-Vought, Inc.* (9th Cir 1983) 711 F2d 1431, 1438, reviewing *Stoddard v Ling-Temco-Vought, Inc.* (CD Cal 1980) 513 F Supp 314 (crash of Air Force plane into ocean shortly after its modification by private defendants).

On application of res ipsa loquitur against common carriers of passengers, see §2.18.

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§2.4 2. Violation of Statute or Regulation

Operating an airplane in violation of a safety statute or regulation creates a rebuttable presumption of negligence under Evid C §669 (see §1.32). *Ayer v Boyle* (1974) 37 CA3d 822, 828, 112 CR 636 (operating unlicensed aircraft in violation of Pub Util C §21411 and federal regulation); *Rudelson v U.S.* (9th Cir 1979) 602 F2d 1326, 1330 (violation of federal regulation requiring pilot to see and avoid other aircraft; followed in *Steering Committee v U.S.* (9th Cir 1993) 6 F3d 572, 576).

There is no presumption, however, if the statute or regulation was not designed to prevent the kind of injury incurred or if there is no causal relation between the violation and the injury. *Franks v Amelia Reid Aviation* (1985) 163 CA3d 1207, 1209, 210 CR 127 (alleged failure to give required notice to pilot of rental aircraft concerning liability insurance; see Pub Util C §24362).

Regulation of the conduct of commercial air carriers through the Federal Aviation Act and its regulations does not preempt traditional tort remedies regulating the same conduct. *In re Air Crash Disaster at Stapleton Int'l Airport* (D Colo 1988) 721 F Supp 1185, 1887. See §2.19.

California statutes covering the safe operation of aircraft (Pub Util C §§21403-21416) are not preempted by federal law. *People v Valenti* (1984) 153 CA3d Supp 35, 200 CR 862 (also rejecting claim of unlawful delegation of legislative power). See Anno, 89 ALR3d 893 (1979) (state criminal statute prohibiting reckless operation of aircraft).

The Warsaw Convention, which applies to certain international flights, may preempt the application of aspects of state law that conflict with its provisions or purposes. See §2.22.

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Source: Torts/California Tort Guide/2 Airplanes/§2.5 3. Expert Testimony

§2.5 3. Expert Testimony

Although a federal regulation (49 CFR §835.3) precludes National Transportation Safety Board (NTSB) employees from giving expert opinion testimony on the probable cause of an aircraft accident, it does not preclude expert testimony by a former NTSB employee about conclusions based on his or her own independent investigation after leaving the NTSB. *Loftleider Icelandic Airlines, Inc. v McDonnell Douglas Corp.* (1984) 158 CA3d 83, 91, 204 CR 358.

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§2.6 B. Choice of Law; Jurisdiction; Inconvenient Forum

Aircraft accident cases arising from interstate or overseas travel usually present choice-of-law problems. See *Zicherman v Korean Air Lines Co.* (1996) 516 US 217, 133 L Ed 2d 596, 607, 116 S Ct 629 (measure of damages for wrongful death in air crash at sea; see §2.22); *In re Aircrash in Bali, Indonesia* (9th Cir 1982) 684 F2d 1301, 1307 (see §2.22); *United Air Lines v Wiener* (9th Cir 1964) 335 F2d 379, 391. See Annos, 39 ALR3d 196 (1971) (crash in territorial waters of state), 62 ALR3d 1076 (1975) (aviation guest statute).

California courts may abate, under the forum non conveniens doctrine, a suit for loss suffered in a foreign air crash. See *Guimei v General Elec. Co.* (2009) 172 CA4th 689, 91 CR3d 178 (airliner crash in China; all witnesses and documents in China); *Britton v Dallas Airmotive, Inc.* (2007) 153 CA4th 127, 62 CR3d 487 (helicopter crash in Idaho; stay after California defendant had obtained summary judgment). But see *Hosaka v United Airlines, Inc.* (9th Cir 2002) 305 F3d 989 (Warsaw Convention overrides discretionary power of federal courts to dismiss for forum non conveniens).

TACTICS: The forum non conveniens doctrine is increasingly invoked by aircraft and component manufacturers, owners, and lessors to avoid application of California and United States law principles, particularly in international accident cases. See Anno, 76 ALR4th 22 (1990) (forum non conveniens in products liability cases. See also §11.32.

Ownership of an airline by a foreign nation may, under the Foreign Sovereign Immunities Act (FSIA) (28 USC §§1330, 1602-1611) deprive a court in the United States of jurisdiction unless one of the act's exceptions to immunity applies. *Coyle v P.T. Garuda Indonesia* (9th Cir 2004) 363 F3d 979 (Indonesia-owned airline immune from suit in U.S.; immunity not waived and claimed exceptions inapplicable to passengers' deaths on side-trip flight separate from flights to and from U.S.).

NOTE: The Ninth Circuit decision in *Coyle* appears to supersede the District Court's opinion in *Coyle v P.T. Garuda Indonesia* (D Or 2001) 180 F Supp 2d 1160, although the latter may contain useful discussion on U.S. jurisdiction over international flights that terminate here.

See also *Dole Food Co. v Patrickson* (2003) 538 US 468, 155 L Ed 2d 643, 123 S Ct 1655 (foreign state must own majority of airline's shares for it to be deemed "agency or instrumentality" entitled to claim FSIA immunities); *Saudi Arabia v Nelson* (1993) 507 US 349, 123 L Ed 2d 47, 113 S Ct 1471 (exception to Act when action based on commercial activity in United States); *Gupta v Thai Airways Int'l Ltd.* (9th Cir 2007) 487 F3d 759 (appellate court ruled 2-1 that it had jurisdiction to rule that dismissal of earlier suit alleging unwarranted exclusion from flight, causing loss of business profits, was res judicata, barring second suit on same facts); *Sugimoto v Exportadora De Sal, S.A. De C.V.* (9th Cir 1994) 19 F3d 1309, 1311 (jurisdiction over corporation affiliated with Mexican government); *P.T. Airfast Servs. v Superior Court* (1983) 139 CA3d 162, 166, 188 CR 628 (jurisdiction under Warsaw Convention; see also §2.22).

The federal courts have exclusive jurisdiction under the Death on the High Seas Act (DOHSA) (46 USC §§761-767) when death occurs in a plane crash on the high seas beyond a marine league from shore. *Cairl v Boeing Co.* (1974) 39 CA3d 137, 139, 113 CR 925; *Ashland v Ling-Temco-Vought, Inc.* (9th Cir 1983) 711 F2d 1431, 1435 n3. Under the Act, the heirs of persons killed in such crashes can neither recover damages for a decedent's predeath pain and suffering, nor recover such damages in a survival action under general maritime law. *Dooley v Korean Air Lines Co., Ltd.* (1998) 524 US 116, 141 L Ed 2d 102, 106, 118 S Ct 1890. See Anno, 66 ALR2d 1002 (1959) (proper forum for action for death over or on high seas).

NOTE: Amendments to DOHSA in 2000 permitted the recovery, in commercial aviation accident cases, of "nonpecuniary" damages, defined as "damages for loss of care, comfort and companionship."

Certain international flights are governed by the Warsaw Convention and the Montreal Agreement. See §2.22.

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C. Persons Liable

§2.7 1. Pilots

A pilot may be negligent in takeoff, landing, or taxiing; operating instruments and controls; complying with traffic patterns and right-of-way rules; choosing a landing field; keeping a lookout; landing with obscured visibility; maintaining proper altitude, speed, and direction of approach; or landing downwind. See *Halbert v Berlinger* (1954) 127 CA2d 6, 273 P2d 274 (landing); *Robart v Brehmer* (1949) 92 CA2d 830, 207 P2d 898 (takeoff); *Sugimoto v Exportadora De Sal,* S.A. De C.V. (9th Cir 1994) 19 F3d 1309, 1311. See Annos, 64 ALR5th 235 (1998) (collision or near-collision with other airplane), 74 ALR2d 615 (1960) (takeoff), 74 ALR2d 628 (1960) (landing), 74 ALR2d 654 (1960) (taxiing).

Special negligence issues may arise from the following:

- Flying in or through adverse weather conditions with inadequate equipment or a limited license, or while in poor physical or mental condition (see *Mittelman v Seifert* (1971) 17 CA3d 51, 79, 94 CR 654; *Hall v Osell* (1951) 102 CA2d 849, 851, 228 P2d 293, 295);
- Insufficient pilot experience (*Halbert v Berlinger* (1954) 127 CA2d 6, 16, 273 P2d 274, 280); and
- Failing to anticipate or take precautions against turbulence or other air or weather conditions (*Small v Transcontinental & W. Air, Inc.* (1950) 96 CA2d 408, 216 P2d 36 (failure to turn on seatbelt sign during turbulence); *Johnson v Western Air Ex press Corp.* (1941) 45 CA2d 614, 625, 114 P2d 688, 694 (failure to turn on propeller deicers); see *Pickering v California Airways Co.* (1931) 117 CA 636, 4 P2d 271; Anno, 73 ALR2d 379 (1960)).

Pilot negligence may also be found in cases involving the following:

- Midair or ground collisions (see Anno, 12 ALR2d 677 (1950));
- Claims of overloading or improper positioning of the load (see Anno, 75 ALR2d 868 (1961)); and
- Violations of federal air regulations or customary or recommended operating practice (*Diamond v Grow* (1966) 243 CA2d 396, 399, 52 CR 265, 267; *Sugimoto v Exportadora De Sal, S.A. De C.V.* (9th Cir 1994) 19 F3d 1309, 1311; see §2.4).

Clearance by air traffic controllers does not relieve a pilot of the ultimate responsibility for the safe operation of the aircraft. *Mattschei v U.S.* (9th Cir 1979) 600 F2d 205, 208. See 14 CFR §§91.3, 91.5. On the other hand, reliance on air controllers may be reasonable under the circumstances. *Foss v U.S.* (9th Cir 1980) 623 F2d 104, 106. See §§2.14-2.15 on duties of Federal Aviation Administration personnel.

A pilot is required to search thoroughly and diligently for other aircraft, but failure to avoid a midair collision is not necessarily negligence as a matter of law.

The duty of vigilance owed by pilots extends to all who share control of the aircraft, including a student pilot and a flight instructor. *Rudelson v U.S.* (9th Cir 1979) 602 F2d 1326, 1330.

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§2.8 2. Airplane Owners and Lessors

The owner or lessor is liable for his or her own negligence in entrusting an aircraft to an improper pilot or in furnishing a defective airplane. See *White v Inbound Aviation* (1999) 69 CA4th 910, 929, 82 CR2d 71 (lessor liable for renting plane for flight to high altitude airport to licensed pilot who had not, however, completed "high altitude checkout"); *Boyd v White* (1954) 128 CA2d 641, 651, 276 P2d 92, 98 (student pilot not per se incompetent). See Anno, 4 ALR2d 1306 (1949) (renting or lending airplane to another). See §4.38 for more on liability for negligent entrustment.

The owner of an aircraft is liable for death or injury resulting from the negligence or wrongful act of anyone operating it with the owner's express or implied permission. Pub Util C §21404; *Cummins v Sky Cruisers, Inc.* (1976) 59 CA3d 983, 985, 130 CR 897. The owner's liability under Pub Util C §21404 is limited to compensatory damages of $15,000 for the death or injury of one person, $30,000 for two or more, and $5000 for property damage. Pub Util C §21404.1. Express or implied permission for the use is essential to such liability. See *Ayer v Boyle* (1974) 37 CA3d 822, 828, 112 CR 636 (co-owner not liable for unknown and unexpected use by other owner).

If title to an aircraft has been transferred from one owner to another, the identity of the owner who is liable under Pub Util C §21404 is decided according to California statutes and common law governing ownership of chattels, regardless of who is shown on federal registration records. *Cummins v Sky Cruisers, Inc.* (1976) 59 CA3d 983, 130 CR 897. See also Pub Util C §24237. Statutes that apply to transfer of automobile ownership (see §4.32) do not apply to aircraft.

Corporate aircraft owners, sued for damaging crops by negligently spraying an herbicide, cannot claim Federal Tort Claims Act immunity under 28 USC §2679(b)(1) as "persons acting on behalf of a federal agency." *Adams v U.S.* (9th Cir 2005) 420 F3d 1049 ("persons" in statute does not include corporations).

The Federal Aviation Act (see 49 USC §§40101-49105) does not itself impose vicarious liability on an owner for the pilot's negligence. *Nachsin v De La Bretonne* (1971) 17 CA3d 637, 639, 95 CR 227. See Anno, 11 ALR Fed 901, 906 (1972).

See Annos, 49 ALR3d 295, 304 (1973) (failure to furnish seatbelt), 50 ALR2d 898 (1956) (duty to furnish navigational and flight safety devices), 30 ALR2d 1172 (1953) (preflight inspection and maintenance).

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§2.9 3. Employers

The usual role of respondeat superior applies in airplane cases. *United Air Servs., Ltd. v Sampson* (1938) 30 CA2d 135, 142, 86 P2d 366, 370. See generally §§4.45-4.62. See Annos, 100 ALR2d 1346 (1965) (deviation from scope of employment), 46 ALR2d 1050 (1956) (pilot's use of own plane).

An inference that the pilot was acting within the scope of employment may be drawn from proof that the pilot was employed by the owner and was operating the airplane with the owner's consent. See *Halbert v Berlinger* (1954) 127 CA2d 6, 17, 273 P2d 274, 280.

An employer may be liable for the negligence of an independent air taxi service under standard exceptions to the independent contractor rule. *Sugimoto v Exportadora De Sal,* S.A. De C.V. (9th Cir 1994) 19 F3d 1309, 1312 (defendant controlled transportation for business visitors to its plant and company town in remote area of Mexico). See §6.9 on general rule that hirer of an independent contractor is not liable for the latter's torts. On the other hand, an airport owner is not vicariously liable for the negligence of a lessee of airport facilities if the lease did not create an employment or independent contractor relationship. *Bostrom v County of San Bernardino* (1995) 35 CA4th 1654, 1668, 42 CR2d 669 (company leased land at county airport for fueling and other services).

The workers' compensation exclusive remedy rule usually immunizes an airline from damages liability to its on-duty employees who were injured in a crash. See §6.21. The Warsaw Convention (see §2.22), however, creates a cause of action for injuries to airline "passengers" that is independent of California law. This "Convention" cause of action can be invoked by a "deadheading" employee injured in a crash, although not by on-duty employees, because the latter are not passengers within the scope of the Convention. *In re Mexico City Aircrash of Oct. 31, 1979* (9th Cir 1983) 708 F2d 400 (rejecting assertion that Federal Aviation Act (see 49 USC §§40101-49105) creates a private right of action).

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§2.10 4. Manufacturers, Suppliers, Repairers

The product liability rules discussed in chap 11 apply to airplane cases. See *Fagerquist v Western Sun Aviation, Inc.* (1987) 191 CA3d 709, 715, 236 CR 633 (strict liability of retail seller of aircraft); *Stevens v Cessna Aircraft Co.* (1981) 115 CA3d 431, 433, 170 CR 925 (manufacturer's duty to warn of load capacity limited to pilot, not passengers); *Pease v Beech Aircraft Corp.* (1974) 38 CA3d 450, 467, 113 CR 416 (strict liability for defect in fuel system). See Annos, 97 ALR3d 627 (1980) (personal injury or death caused by defect in aircraft or equipment), 38 ALR3d 1247 (1971) (defective military equipment), 35 ALR3d 707, 712 (1971) (helicopter manufacturers). See also *Baker v Beech Aircraft Corp.* (1974) 39 CA3d 315, 114 CR 171 (concealment of defective fuel system tolled statute of limitations).

The General Aviation Revitalization Act of 1994 (GARA) (49 USC §40101), however, is a statute of repose that bars claims against the manufacturer of any component of a light aircraft more than 18 years after the product was first sold. See *Blazevska v Raytheon Aircraft Co.* (9th Cir 2008) 522 F3d 948 (manufacturer that sold plane in 1980 to Macedonian government not liable for deaths in 2004 crash in Bosnia; GARA application not precluded by presumption against extraterritorial application of statute); *Estate of Kennedy v Bell Helicopter Textron, Inc.* (9th Cir 2002) 283 F3d 1107 (18-year period began to run on aircraft's original delivery date, not 16 years later when first certified as a "general aviation aircraft"); *Burroughs v Precision Airmotive Corp.* (2000) 78 CA4th 681, 93 CR2d 124 (immunity extends to manufacturer's corporate successor; no basis for liability based on defendant's acting outside capacity as manufacturer); *Lyon v Agusta S.P.A.* (9th Cir 2001) 252 F3d 1078 (suit against Italian airplane maker retroactively preempted by GARA).

A subsequent modification of system or subassembly in an aircraft does not start a new 18-year limitations period under GARA except as to new parts added during the modification; the replacement of fewer than all the components of a system does not trigger a new period with respect to the defects in components not replaced. *Hiser v Bell Helicopter Textron, Inc.* (2003) 111 CA4th 640, 651, 4 CR3d 249 (substantial evidence, however, supported finding that defects in parts added to fuel system less than 18 years earlier caused flameout and crash). A manufacturer's concealing or withholding of information it is required to furnish to the Federal Aviation Administration (FAA) creates an exception to GARA's 18-year limitations period. *Butler v Bell Helicopter Textron, Inc.* (2003) 109 CA4th 1073, 1082, 135 CR2d 762 (manufacturer withheld from FAA information about other tail rotor yoke failures that occurred before it sought approval to increase retirement life of such assemblies).

A manufacturer may be liable for an accident caused by the defective design of an aircraft that violated Federal Aviation Administration safety standards even though the FAA had issued a certificate declaring that the design met all applicable safety standards. *Elsworth v Beech Aircraft Corp.* (1984) 37 C3d 540, 550, 208 CR 874 (negligence is alternative ground for airplane manufacturers' liability; Federal Aviation Act (see 49 USC §§40101-49105) does not preempt the California doctrine of negligence per se (see §1.31)). See *McGee v Cessna Aircraft Co.* (1983) 139 CA3d 179, 190, 188 CR 542 (fire on crash caused by failure to comply with firewall regulation).

The burden of disproving proximate cause may be imposed on a defendant who violated a safety regulation if the crash destroyed the physical evidence (*McGee v Cessna Aircraft Co., supra*) but not if the aircraft and its parts remain available for analysis (*Fagerquist v Western Sun Aviation, Inc.* (1987) 191 CA3d 709, 726, 236 CR 633).

Actions against independent servicers or repairers of aircraft are generally based on traditional concepts of negligence. See *Fagerquist v Western Sun Aviation, Inc.* (1987) 191 CA3d 709, 720, 236 CR 633 (failure to use checklist during inspections as required by regulation). See Anno, 41 ALR3d 1320 (1972) (negligence of independent aircraft servicer or repairer).

The statute of repose provisions of the General Aviation Revitalization Act of 1994 (49 USC §40101 note) bar a suit against the manufacturer of a general aviation aircraft based on an accident that occurred more than 18 years after the plane was delivered to its first purchaser. *Campbell v Parker-Hannifin Corp.* (1999) 69 CA4th 1534, 82 CR2d 202 (replacement part, misrepresentation, and concealment exceptions not applicable).

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§2.11 5. Chart Publishers

Publishers of approach charts for the guidance of pilots are subject to product liability rules for defective products. *Fluor Corp. v Jeppesen & Co.* (1985) 170 CA3d 468, 474, 216 CR 68 (approach chart failed to list highest hill in area).

Further, a chart seller, under the strict liability for component parts doctrine, may be liable for injury caused by a defect that was due to another's fault. *Brocklesby v U.S.* (9th Cir 1985) 767 F2d 1288, 1296 (chart defect allegedly caused by Federal Aviation Administration).

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§2.12 6. Landing Strip Operators

Persons who own or maintain a landing strip have a duty, at a minimum, to design and maintain the strip in compliance with applicable regulations. *Gordon v Havasu Palms, Inc.* (2001) 93 CA4th 244, 247, 112 CR2d 816 (private plane crash; triable issue presented by evidence that clearance approach and gradient did not conform to specific regulations).

NOTE: The California Supreme Court granted, then dismissed (after a settlement), review of a court of appeal opinion that upheld the liability of a service company towing an aircraft for property damage when the towed plane hit another plane. See *Northwest Airlines, Inc. v Ontario Aircraft Servs., Inc.* (review granted Apr. 9, 2003, and dismissed July 23, 2003, S113305; superseded opinion at 104 CA4th 1053, 129 CR2d 146). See also note in §2.32.

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§2.13 7. Air Show Organizers

Plaintiffs must present evidence that the legal fault of an air show organizer caused the death or injury sued on before vicarious liability may be imposed on the public entity that authorized the show to be conducted at its airport. *Dixon v City of Livermore* (2005) 127 CA4th 32, 25 CR3d 50.

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8. United States

§2.14 a. Air Traffic Control

Subject to specific statutory exceptions (see *U.S. v Varig Airlines* (1984) 467 US 797, 808, 81 L Ed 2d 660, 671, 104 S Ct 2755), the United States is liable under the Federal Tort Claims Act (FTCA) (28 USC §§1346(b), 2671-2680) for injury caused by negligence of federal employees acting in the course of their duties, including air traffic controllers and other federal airport personnel. See *Steering Committee v U.S.* (9th Cir 1993) 6 F3d 572, 574; *Rudelson v U.S.* (9th Cir 1979) 602 F2d 1326, 1331; *Mattschei v U.S.* (9th Cir 1979) 600 F2d 205, 209. See Annos, 46 ALR Fed 24 (1980) (liability for operation of control tower), 5 ALR Fed 440 (1970) (claims under FTCA arising from aircraft operation).

The rights and liabilities of parties in FTCA actions are determined by the law, including choice of law rules, of the jurisdiction where the conduct occurred. *Beech Aircraft Corp. v U.S.* (9th Cir 1995) 51 F3d 834, 838. Thus, suits arising out of California accidents are usually governed by the general negligence law of California (*Beech Aircraft Corp. v U.S., supra*), including principles of comparative negligence (*Rudelson v U.S.* (9th Cir 1979) 602 F2d 1326) and comparative indemnity (*Mattschei v U.S.* (9th Cir 1979) 600 F2d 205, 209).

Under general negligence rules, air traffic controllers who comply literally with safety statutes and rules are not necessarily free from negligence; the circumstances may require that more be done. Thus, controllers must take measures beyond those set forth in Federal Aviation Administration manuals if necessary for pilot and passenger safety. *Rudelson v U.S.* (9th Cir 1979) 602 F2d 1326, 1329. Conversely, without notice to the contrary, controllers are not required to anticipate a pilot's unlawful or negligent acts. *Beech Aircraft Corp. v U.S.* (9th Cir 1995) 51 F3d 834, 840.

The duty to exercise due care to avoid accidents is a concurrent one, resting on both control tower personnel and the pilot, although the pilot has the ultimate responsibility for the safe operation of the aircraft. 51 F3d at 838; *Rudelson v U.S., supra*; *Mattschei v U.S.* (9th Cir 1979) 600 F2d 205, 208.

Controllers have been found negligent for the following:

- Failing to warn a pilot of nearby aircraft (*Rudelson v U.S., supra*; *Mattschei v U.S., supra*) or of obstructions that are obscured by atmospheric conditions (*Foss v U.S.* (9th Cir 1980) 623 F2d 104); and
- Failing to closely monitor a training aircraft in or near the airport entry corridor (*Rudelson v U.S., supra*).

A controller is not necessarily negligent, however, for failing to demand that a pilot execute a particular procedure of which the pilot was reasonably expected to know. *Beech Aircraft Corp. v U.S.* (9th Cir 1995) 51 F3d 834, 837.

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§2.15 b. Federal Aviation Administration Functions

The discretionary function exception to the Federal Tort Claims Act (28 USC §2680(a)) precludes liability of the United States based on conduct of the Federal Aviation Administration in the certification of aircraft for commercial use. *U.S. v Varig Airlines* (1984) 467 US 797, 819, 81 L Ed 2d 660, 678, 104 S Ct 2755; *GATX/Airlog Co. v U.S.* (9th Cir 2002) 286 F3d 1168. See generally §8.11.

Liability has been imposed for the FAA's negligence in its performance of ministerial functions, as in publishing a dangerous traffic pattern for an airport approach and in failing to revise that pattern after being warned of the danger. *Foss v U.S.* (9th Cir 1980) 623 F2d 104. See *United Air Lines v Wiener* (9th Cir 1964) 335 F2d 379, 393 (disregarding official directions that leave no room for policy judgment and decision is ministerial act).

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Source: Torts/California Tort Guide/2 Airplanes/§2.16 c. Military Activities

§2.16 c. Military Activities

The United States is subject to liability under the Federal Tort Claims Act for the following:

- Negligent operation of aircraft by military pilots in the course of duty (*United Air Lines v Wiener* (9th Cir 1964) 335 F2d 379, 388); and
- Failure to warn airline companies of dangerous military aircraft operations in an area flown by airlines (335 F2d at 397).

See also *USAir, Inc. v United States Dep't of Navy* (9th Cir 1994) 14 F3d 1410, 1412 (Navy employee's negligent stowing of briefcase in commercial airliner's overhead compartment). See §2.17.

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D. Air Carriers' Duties to Passengers

§2.17 1. Common Carrier's Duty to Passenger for Reward

An airline or other air common carrier of passengers for reward has a duty to use the utmost care and diligence for their safety. CC §2100; *Smith v O'Donnell* (1932) 215 C 714, 717, 12 P2d 933, 934; *Irwin v Pacific S.W. Airlines* (1982) 133 CA3d 709, 715, 184 CR 228; *Roberts v Trans World Airlines* (1964) 225 CA2d 344, 352, 37 CR 291, 296. This higher standard of care may not apply, however, when state law is preempted by the Airline Deregulation Act or the Warsaw Convention. See §2.19. For more on the duty of utmost care, see §§5.3, 5.6-5.8. See Annos, 73 ALR2d 346, 358 (1960) (air carrier's duties to passengers), 75 ALR2d 848 (1961) (air pressure changes), 73 ALR2d 379 (1960) (downdraft, updraft, or turbulence), 49 ALR3d 295, 301 (1973) (failure to require use of seatbelt).

The carrier's duty of utmost care applies throughout the passenger's transportation, including boarding and alighting from the aircraft. *USAir, Inc. v United States Dep't of Navy* (9th Cir 1994) 14 F3d 1410, 1414 (duty begins when passenger boards aircraft, before takeoff). However, the duty of utmost care does not begin before the passenger boards. *Gray v America W. Airlines, Inc.* (1989) 209 CA3d 76, 85, 256 CR 877 (no liability when ticketed passenger tripped over luggage at check-in counter); *Orr v Pacific S.W. Airlines* (1989) 208 CA3d 1467, 1472, 257 CR 18 (duty is that of reasonable care while prospective passenger is passing through inspection area at carrier's station). The utmost care standard terminates when the passenger safely departs from the aircraft. *Marshall v United Airlines* (1973) 35 CA3d 84, 86, 110 CR 416 (no liability when passenger fell in airport area not controlled by airline). See Annos, 14 ALR5th662 (1993) (air carrier's liability for injury from condition of airport premises), 61 ALR2d 1113 (1958) (boarding and alighting passengers).

As a common carrier of passengers for reward, an airline has a duty to exercise the utmost care in maintaining, as well as operating, the aircraft. CC §2101. See *Gradus v Hanson Aviation, Inc.* (1984) 158 CA3d 1038, 1049, 205 CR 211 (jury instructions on duty). This duty includes the overhead storage of luggage. *Vinnick v Delta Airlines, Inc.* (2001) 93 CA4th 859, 868, 113 CR2d 471 (airline could be liable under utmost care standard for failing to assist passenger whose bag fell on plaintiff); *Andrews v United Airlines* (9th Cir 1994) 24 F3d 39, 41; *USAir, Inc. v United States Dep't of Navy, supra*. Whether an airline is strictly liable for injury caused by a defect in the aircraft appears to remain an open question. See *Nelson v American Airlines, Inc.* (1968) 263 CA2d 742, 748, 70 CR 33, 37 (issue not properly raised). See §2.10 on manufacturers' strict product liability. The duty to maintain the aircraft is at least nondelegable; *i.e.,* the air carrier would be liable for the negligence of an independent contractor hired to perform maintenance. See §5.7.

See Anno, 32 ALR5th 1 (1995) (air carrier liability to passenger injured by falling luggage).

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§2.18 a. Applying Res Ipsa Loquitur

Because an air common carrier owes a passenger for reward a duty to use the utmost care, res ipsa loquitur is more readily available in airline accident cases than in "ordinary care" cases. On the res ipsa loquitur presumption generally, see §§1.35-1.40. An inference of negligence arises on proof that an airline passenger was injured as the result of the aircraft's operation. *Irwin v Pacific S.W. Airlines* (1982) 133 CA3d 709, 715, 184 CR 228. See Anno, 25 ALR4th 1237 (1983) (res ipsa loquitur in aviation accidents).

Res ipsa loquitur has been applied in favor of a common carrier's passengers in such situations as the following:

- Malfunction causing the aircraft to nose down sharply (*Nelson v American Airlines, Inc.* (1968) 263 CA2d 742, 745, 70 CR 33, 36);
- Midair collision (*Smith v O'Donnell* (1932) 215 C 714, 722, 12 P2d 933, 936; *Irwin v Pacific S.W. Airlines, supra,* 133 CA3d at 716); and
- Unapparent cause of accident (*Roberts v Trans World Airlines* (1964) 225 CA2d 344, 355, 37 CR 291, 297).

See Anno, 6 ALR2d 528, 536 (1949).

In such cases, the carrier must meet or balance the inference of negligence by evidence showing its use of the utmost care, either

- explaining the accident as arising from a nonnegligent cause (see *Gradus v Hanson Aviation, Inc.* (1984) 158 CA3d 1038, 1056, 205 CR 211 (unsuccessful "autorotation" of helicopter as nonnegligent cause); *Roberts v Trans World Airlines* (1964) 225 CA2d 344, 352, 37 CR 291, 296); or
- showing that the carrier exercised sufficient care in all respects (see *Nelson v American Airlines, Inc.* (1968) 263 CA2d 742, 746, 70 CR 33, 36).

A carrier that fails to rebut the inference by presenting evidence of either circumstance is deemed negligent as a matter of law. *Irwin v Pacific S.W. Airlines* (1982) 133 CA3d 709, 716, 184 CR 228.

TACTICS: Most aviation accident cases require the use of expert testimony and evidence to establish liability as well as such challenges as choice of law, jurisdiction, and venue; plaintiffs can rarely rely on res ipsa loquitur alone to shift burdens of proof to defendants.

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Source: Torts/California Tort Guide/2 Airplanes/§2.19 b. Applying Federal Preemption

§2.19 b. Applying Federal Preemption

The Federal Aviation Act (a revision of the Airline Deregulation Act (former 49 USC §1305)) in 49 USC §41713(b)(4)(A) preempts state law related to "service" of an air carrier. Thus, the preemption is limited to such economic regulation as an airline's "rates and routes"; federal law does not immunize an airline from liability under state law for personal injury caused by its tortious conduct. *Vinnick v Delta Airlines, Inc.* (2001) 93 CA4th 859, 868, 113 CR2d 471 (airline could be liable under utmost care standard for failing to assist passenger whose bag fell on plaintiff); *Charas v Trans World Airlines, Inc.* (9th Cir 1998) 160 F3d 1259. Similarly, federal law does not preempt a state law claim for unlawfully discriminating against a physically disabled passenger. *Newman v American Airlines, Inc.* (9th Cir 1999) 176 F3d 1128. See *Duncan v Northwest Airlines, Inc.* (9th Cir 2000) 208 F3d 1112 (Act does not preempt flight attendants' class action contending that airline's smoking policy exposed them to secondhand smoke).

NOTE: In *Charas,* the Ninth Circuit en banc expressly overruled previous panel holdings that applied the federal preemption concept to bar or limit passengers' personal injury claims made under state tort law, including *Gee v Southwest Airlines* (9th Cir 1997) 110 F3d 1400, 1408 (Act prevents application of state's "utmost care" statute (see §2.17) to claims for failure to assist disabled passenger and failure to prevent passenger harassment), and *Harris v American Airlines, Inc.* (9th Cir 1995) 55 F3d 1472, 1477 (failure to prevent harassment of one passenger by another). See also *Stone v Continental Airlines* (D Haw 1995) 905 F Supp 823, 826 (failure to prevent assault by another passenger).

Even before the *Charas* decision, cases had rejected "federal preemption" restrictions on state law claims, some arguing that the act was intended to deregulate the "economic" or "service" aspects of air travel, not such matters as aircraft maintenance and operation. See *Romano v American Trans Air* (1996) 48 CA4th 1637, 1642, 56 CR2d 428 (plaintiff harassed and struck by another passenger during flight); *Gee v Southwest Airlines, supra* (no preemption of claims based on unlatched door, object falling from overhead bin, or spoliation of evidence); *Hodges v Delta Airlines, Inc.* (5th Cir 1995) 44 F3d 334, 340 (passenger struck by object that fell from overhead bin); *Meinhold v Trans World Airlines, Inc.* (CD Cal 1996) 949 F Supp 758, 762 (same); *Manning v Skywest Airlines* (CD Cal 1996) 946 F Supp 767 (passenger thrown about when pilot temporarily lost control); *Ducombs v Trans World Airlines* (ND Cal 1996) 937 F Supp 897 (passenger struck by object falling from overhead bin). See also additional cases collected in *Romano v American Trans Air* (1996) 48 CA4th 1637, 1643, 56 CR2d 428.

NOTE: The court may find preemption in subject areas in which the Federal Aviation Administration has issued "pervasive regulations," but not in areas without these regulations or other grounds for preemption. See *Martin v Midwest Express Holdings, Inc.* (9th Cir 2009) 555 F3d 806 (no pervasive regulations about airstairs; airline that had paid damages to passenger injured in fall on stairs could pursue indemnity claim against stairs' manufacturer).

In a DVT case, the Ninth Circuit has upheld a ruling that the Federal Aviation Act of 1958 (FAA) (49 USC §40103) preempted a cause of action for failure to warn of the danger of developing DVT, but not a cause of action alleging unsafe seating configuration on a domestic flight, while remanding for a redetermination of whether the airline had presented adequate evidence to show preemption of the latter cause of action under 49 USC §41713(b)(3) on ground that requiring more legroom would impermissibly affect airline prices. *Montalvo v Spirit Airlines* (9th Cir 2007) 508 F3d 464.

The duty of utmost care under CC §2100 does not apply to international flights governed by the Warsaw Convention (see §2.22), although the Convention establishes a presumption of the carrier's liability. *Bradfield v Trans World Airlines* (1979) 88 CA3d 681, 685, 152 CR 172.

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§2.20 2. Private Carrier's Duty to Passenger for Reward

The duty to use the utmost care for the safety of persons carried for reward has been said not to apply to a private air carrier, which appears to owe only a duty of ordinary care. See *Dziura v California Aviation Serv.* (1970) 4 CA3d 191, 197, 84 CR 191 (aviation school's duty to pupil). For further discussion, see §5.3. See Anno, 73 ALR2d 346, 369 (1960) (common or private carrier; resulting duties).

Whether the operator of a charter flight is a private or common carrier depends on its method of doing business. Important factors tending to show a common carrier operation include having an established place of business; engaging in the operation as a regular business, not as a casual or occasional undertaking; charging standard fees; and advertising to carry all passengers for hire without discrimination. See *Gradus v Hanson Aviation, Inc.* (1984) 158 CA3d 1038, 1048, 205 CR 211. See Annos, 41 ALR3d 455 (1972) (common or private air carrier), 73 ALR2d 346 (1960) (charter flight).

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§2.21 3. Carrier's Duty to Guest or Gratuitous Passengers

Nonpaying passengers or guests on airplanes are owed at least ordinary care and diligence for their safe carriage. CC §2096 (gratuitous carriage, *i.e.,* persons carried "without reward"). For more on duties owed to gratuitous passengers, see §5.18.

NOTE: The former airplane guest statute (former Pub Util C §21406) that limited a pilot's or owner's liability to injury caused by intoxication or willful misconduct was repealed in 1973. See *Ayer v Boyle* (1974) 37 CA3d 822, 112 CR 636 (statute unconstitutional). But see *Aas v Avemco Ins. Co.* (1976) 55 CA3d 312, 127 CR 192 (liability policy's exclusion of occupants valid even after repeal of airplane guest statute).

Flights from or into another state may involve a choice-of-law problem if the other state retains an aviation guest statute. See Anno, 62 ALR3d 1076 (1975).

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§2.22 E. Warsaw Convention; Montreal Agreement; Contract Limitations

The 1929 Warsaw Convention is a multinational treaty, adhered to by most countries whose airlines have international routes, including, since 1934, the United States. See 49 Stat 3000. The Convention makes air carriers engaged in international flights liable for injuries sustained by airline passengers (subject to damage limitations) if the accident that caused the damage occurred on board the aircraft or while boarding or alighting. See *Air France v Saks* (1985) 470 US 392, 394, 84 L Ed 2d 289, 293, 105 S Ct 1338; *P.T. Airfast Servs. v Superior Court* (1983) 139 CA3d 162, 166, 188 CR 628. See Annos, 51 ALR Fed 949 (1981) (Warsaw Convention as creating cause of action); 113 L Ed 2d 806 (1993) (Supreme Court's construction of Warsaw Convention).

By the Montreal Agreement of 1966, signatory airlines accepted absolute liability (waiving "due care" defenses) for injury to passengers, to a damage limit of $75,000, applicable to international flights that have a point of departure or a stop in the United States. See *Air France v Saks* (1985) 470 US 392, 84 L Ed 2d 289, 301, 105 S Ct 1338; *Steering Committee v U.S.* (9th Cir 1993) 6 F3d 572, 574; *In re Aircrash in Bali, Indonesia, supra*.

NOTE: The Warsaw Convention and the Montreal Agreement are set out in 49 United States Code Annotated following §40105. A number of airlines have agreed to a proposed Transportation Department regulation (also set out following §40105) allowing them to waive the $75,000 damage limit. The Convention and its patchwork of amendments, protocols, and agreements are often referred to collectively as the "Warsaw System" of liability. Determining which version governs any particular case depends on the airline and the countries involved. The United States ratified the most recent iteration, Convention for the Unification of Certain Rules Relating to International Carriage by Air, May 28, 1999, S. Treaty Doc. No. 106-4 (reprinted at 1999WL 33292734), which came into force for the United States in November 2003. It governs flights after that date between the United States and a growing number of signatories. As with prior versions of the 1929 treaty, Warsaw case law generally applies to cases governed by the latest version.

The Convention precludes a United States court from dismissing a suit on grounds that another country provided a more convenient forum. See *Hosaka v United Airlines, Inc.* (9th Cir 2002) 305 F3d 989 (Convention overrides discretionary power of federal courts to dismiss for forum non conveniens). On jurisdiction of actions under the Convention, see *Sopcak v Northern Mountain Helicopter Serv.* (9th Cir 1995) 52 F3d 817, 819. See Anno, 6 ALR3d 1272 (1966) (venue and jurisdiction).

NOTE: Under Article 33 of the Montreal Agreement, plaintiffs in personal injury and wrongful death cases now have the additional option of filing an action in the so-called "fifth jurisdiction," the country of the passenger's "principal and permanent residence."

The Convention creates an express presumption of carrier liability for any "accident," unless the carrier proves that all necessary measures were taken to avoid damages, or that it was impossible to take such measures. See *In re Aircrash in Bali, Indonesia, supra*.

The Convention does not resolve the issues of "who may recover, and what compensatory damages they may receive" but provides a "pass through" authorizing courts to apply the domestic law that would govern absent the Convention. *Zicherman v Korean Air Lines Co.* (1996) 516 US 217, 227, 133 L Ed 2d 596, 606, 116 S Ct 629 (see below); *In re Air Crash at Taipei, Taiwan* (2002) 219 F Supp 2d 1069 (Convention does not permit punitive damages).

Constitutional objections to damage limitations have been rejected on the basis that passengers have a remedy under the Tucker Act (28 USC §1491) if the limitation constitutes a "taking" under the Fifth Amendment. *In re Aircrash in Bali, Indonesia* (9th Cir 1982) 684 F2d 1301, 1310.

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§2.23 1. Effect of Airline's Willful Misconduct

The Convention excepts from its limitation on damages (originally set at about $8300) any injury or death caused by the carrier's "willful misconduct." See *Olympic Airways v Husain* (2004) 540 US 644, 157 L Ed 2d 1146, 124 S Ct 1221 (death by asthma attack caused by cigarette smoke that wafted from smoking section to nonsmoking section was "accident" that, because of airline employees' ignoring repeated requests to move decedent farther away from smoking section, resulted from willful misconduct); *Koirala v Thai Airways Int'l, Ltd.* (9th Cir 1997) 126 F3d 1205 (finding of willful misconduct sustained when flight crew failed to monitor navigational instruments in high mountain area); *In re Pago Pago Aircrash* (CD Cal 1976) 419 F Supp 1158. It also permits contracts for a higher limit, but invalidates any contract purporting to lower or remove the carrier's liability. See *In re Aircrash in Bali, Indonesia, supra*. See Anno, 13 ALR2d 337, 344 (1950) (limitation of air carrier's liability). See also Anno, 41 ALR3d 455, 474 (1972) (charter flights; Warsaw Convention limitations).

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§2.24 2. Events Within Definition of "Accident"

A carrier's liability under the Convention is limited to injuries to passengers caused by an "accident" in the sense of an unexpected or unusual event. Hence, injuries caused by "internal reactions" to routine aircraft procedures are not deemed "accidents" within the Convention. *Air France v Saks* (1985) 470 US 392, 84 L Ed 2d 289, 300, 105 S Ct 1338 (no liability under Convention for injury to passenger caused by normal operation of aircraft pressurization system).

Injury resulting from deep-vein thrombosis (DVT) caused by sitting in a cramped seat for the duration of a long flight is not an injury caused by an accident. *Twardowski v American Airlines* (9th Cir 2008) 535 F3d 952, 958 (failing to warn about the risk of DVT not an "event" that would qualify as an "accident"); *Caman v Continental Airlines* (9th Cir 2006) 455 F3d 1087 (no liability for failure to warn of risk of DVT); *Rodriguez v Ansett Australia LTD* (9th Cir 2004) 383 F3d 914 (same); *Miller v Continental Airlines, Inc.* (ND Cal 2003) 260 F Supp 2d 931 (allegations of defective seat design unavailing). See *In re Deep Vein Thrombosis Litig.* (ND Cal 2006) 2006 US Dist Lexis 63394 (nonliability of aircraft manufacturers noted; nonliability of airlines ruled consistent with foreign court decisions and not inconsistent with *Olympic Airways v Husain* (2004) 540 US 644, 157 L Ed 2d 1146, 124 S Ct 1221). See §2.19 on preemption of DVT claims alleging failure to warn.

Unexpected, unusual, or unintended occurrences, however, are subject to the Convention. *Gezzi v British Airways PLC* (9th Cir 1993) 991 F2d 603, 605 (passenger slipped on water on stairs used for embarking); *Sharma v Virgin Atl. Airways* (CD Cal 2006) 2006 US Dist Lexis 20127 (slip on liquid soap on lavatory floor). See also Anno, 78 ALR Fed 459 (1986) (what constitutes "accident" under Convention). The misplacement of a passenger's confiscated carry-on bag, which contained a breathing device essential to her health, can be an accident under the Convention, and the circumstances of the taking willful misconduct, justifying recovery for her death some days later. *Prescod v AMR, Inc.* (9th Cir 2004) 2004 US App Lexis 17660 (unpublished; remanded for consideration of passenger's contributory negligence in failing to acquire a new device after landing).

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§2.25 3. Preemption of State Tort Law

The Warsaw Convention, when it governs, preempts state tort liability law; a personal injury recovery that would not be allowed under the Convention is not available at all. *Carey v United Airlines* (9th Cir 2001) 255 F3d 1044, 1048 (Convention bars state-law emotional distress claim after in-flight verbal altercation). See *In re Aircrash in Bali, Indonesia* (9th Cir 1982) 684 F2d 1301, 1308 (Convention limitation on damages controls); *Jack v Trans World Airlines, Inc., supra* (Convention provides exclusive basis of recovery for damages arising from delay); *Brandt v American Airlines* (ND Cal 2000) 2000 US Dist Lexis 3164 (Convention preempts federal and state law claims based on alleged willful misconduct, intentional torts, and discrimination). See also *Bradfield v Trans World Airlines* (1979) 88 CA3d 681, 686, 152 CR 172 (Convention preempts CC §2100), which states statutory duties of common carriers for reward). But see *Lavadenz de Estenssoro v American Jet* (ND Cal 1996) 944 F Supp 813 (suit on foreign plane crash; not all state causes of action are preempted).

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§2.26 4. Preboarding and Postdisembarking Injuries

The Warsaw Convention does not cover injuries incurred before boarding. See *El Al Israel Airlines, Ltd. v Tsui Yuan Tseng* (1999) 525 US 155, 142 L Ed 2d 576, 119 S Ct 662 (intrusive preboarding security search not "accident"; resulting emotional distress not "bodily injury"); *Aquino v Asiana Airlines, Inc.* (2003) 105 CA4th 1272, 1280, 130 CR2d 223 (no preemption of suit for emotional distress suffered by ticketed passengers denied right to board as "too old to travel" without medical certificate).

A passenger who slipped and fell in an airport corridor after deplaning from a flight and while proceeding to the gate for a connecting flight could not invoke Convention's liability provisions. *Maugnie v Compagnie Nationale Air France* (9th Cir 1977) 549 F2d 1256, 1262.

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§2.27 5. Notice to Passengers

The Warsaw Convention provides that carriers must deliver a passenger ticket stating that transportation is subject to the liability rules of the Convention, and the Montreal Agreement requires carriers to give passengers written notice of the damage limitations in print size no smaller than 10-point type. However, the Montreal Agreement imposes no penalty or sanction for failure to comply; hence, the damage limitation is not eliminated by a notice printed on the ticket in smaller print. *Chan v Korean Air Lines, Ltd.* (1989) 490 US 122, 135, 104 L Ed 2d 113, 127, 109 S Ct 1676 (notice on ticket in 8-point type). The Convention provides that the provisions limiting the carrier's liability do not apply if the carrier accepts a passenger without delivering a ticket. 104 L Ed 2d at 122. See *Miceli v MGM Grand Air, Inc.* (1996) 51 CA4th 702, 59 CR2d 311 (airline pilot who was never issued a ticket not limited by Warsaw Convention). See also *Warren v Flying Tiger Line, Inc.* (9th Cir 1965) 352 F2d 494 (delivering ticket to serviceman at the foot of boarding ramp insufficient basis for imposing damages limitation).

Air carriers cannot avoid or limit liability for passenger injuries by inserting a limiting provision in a ticket, except as permitted by treaty or statute. See Anno, 91 ALR Fed 547 (1989). See discussion in §5.22. Two commercial entities, however, are entitled to limit by contract the liability of one to the other or to otherwise allocate the risk of doing business, subject to the rule of strict construction of contract clauses seeking to limit liability. *Philippine Airlines, Inc. v McDonnell Douglas Corp.* (1987) 189 CA3d 234, 237, 234 CR 423 (limitation of liability of aircraft manufacturer in sale contract with airline).

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§2.28 6. Damages Preclusions: Emotional Distress; Wrongful Death

The Convention allows recovery only for bodily injury in the physical sense, not for emotional distress alone. *Eastern Airlines, Inc. v Floyd* (1991) 499 US 530, 542, 113 L Ed 2d 569, 581, 111 S Ct 1489 (passengers told that aircraft would be ditched in ocean, but aircraft landed safely); *In re Air Crash off Point Mugu* (ND Cal 2001) 145 F Supp 2d 1156, 1161 (Convention bars punitive and "purely emotional distress" damages, but not damages for emotional distress arising out of physical injury in "violent ride" during half hour before crash). The Convention's limitation to bodily injury damages precludes damages for posttraumatic stress disorder (PTSD) allegedly suffered by a minor passenger not protected by the airline from assault and molestation by another passenger. *Doe v United Airlines, Inc.* (2008) 160 CA4th 1500, 1505, 73 CR3d 541 (not material was psychologist's evidence that PTSD has physical basis, including alteration of brain chemistry and physiology).

Wrongful death damages arising out of an air crash on the high seas are governed by the Death on the High Seas Act (DOHSA) (46 USC §§761-767). See *Zicherman v Korean Air Lines Co.* (1996) 516 US 217, 231, 133 L Ed 2d 596, 609, 116 S Ct 629 (under former provision limiting recovery to "pecuniary loss," no recovery for loss of society; see §2.6); *Saavedra v Korean Air Lines Co.* (9th Cir 1996) 93 F3d 547, 552 (no recovery for survivor's grief or for predeath pain and suffering); *In re Korean Air Lines Disaster* (DC Cir 1991) 932 F2d 1475, 1484 (no punitive damages).

NOTE: Amendments to DOHSA in 2000 permitted the recovery, in commercial aviation accident cases, of "nonpecuniary" damages, defined as "damages for loss of care, comfort and companionship" for any death occurring after July 16, 1996. Thus, 46 USC §§761, 762 now allow damages available under state and federal rules. See *Brown v Eurocopter S.A.* (USDC SD Tex 2000) 111 F Supp 2d 859, 861.

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§2.29 7. Damage to Freight

The Warsaw Convention also applies monetary liability limits to the loss of, or damage to, freight shipped by air. See *Motorola, Inc. v Federal Express Corp.* (9th Cir 2002) 308 F3d 995 (limit based on entire weight of shipment; prejudgment interest recoverable); *Insurance Co. of N. Am. v Federal Express Corp.* (9th Cir 1999) 189 F3d 914 (Convention limits applied to computer chips stolen from warehouse located within airport). But see *Albingia Versicherungs A.G. v Schenker Int'l, Inc.* (9th Cir 2003) 344 F3d 931 (waybill, not Convention limits, applied to computer chips stolen from warehouse located outside airport); *Dazo v Globe Airport Sec. Servs.* (9th Cir 2002) 295 F3d 934 (Convention does not apply to limit recovery for loss of carry-on bag stolen while passenger was going through security checkpoint before boarding; security company acting for several airlines not within Convention's definition of "carrier"). For the Convention's monetary limits to apply to a passenger's baggage, however, the baggage check must contain specified information and statements. See *Spanner v United Airlines, Inc.* (9th Cir 1999) 177 F3d 1173. See also *Hitachi Data Sys. Corp. v United Parcel Serv.* (9th Cir 1996) 76 F3d 276, 279 (failure to include required information on air waybill). The Convention does not apply to shipments from Taiwan even though the Republic of China has signed it. See *Mingtai Fire & Marine Ins. Co., Ltd. v United Parcel Serv.* (9th Cir 1999) 177 F3d 1142 (liability limits in air waybill were lower than those permitted under Convention). The Convention's limitations apply to damage to freight that occurred on board an aircraft or in an airport (or nonairport landing place) only. See *Read-Rite Corp. v Burlington Air Express, Ltd.* (9th Cir 1999) 186 F3d 1190.

Liability for loss of air freight may be decided under an amended version of the Warsaw Convention; the Montreal Protocol No. 4 brought the Hague Protocol of 1955 into force in the United States on March 4, 1999. See *Continental Ins. Co. v Federal Express Corp.* (9th Cir 2006) 454 F3d 951 (suit over value of computer parts lost between Hong Kong and Pasadena).

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III. DEFENSES

§2.30 A. Contributory Negligence; Comparative Fault and Indemnity

The contributory negligence of the injured person (or the person seeking damages) does not bar recovery, but damages are reduced in the proportion that such person's fault bears to that of all other persons. See §1.41 on California's comparative fault system. See Annos, 35 ALR3d 614 (1971) (contributory negligence of pilot), 75 ALR2d 858 (1961) (passenger interference with pilot or controls).

Comparative fault principles apply to actions subject to the Warsaw Convention. See *Bradfield v Trans World Airlines* (1979) 88 CA3d 681, 686, 152 CR 172. Further, comparative negligence is a defense in Federal Tort Claims Act (FTCA) suits alleging that the negligence of the Federal Aviation Administration or its air traffic controllers caused a pilot's injury or death. See *Foss v U.S.* (9th Cir 1980) 623 F2d 104; *Rudelson v U.S.* (9th Cir 1979) 602 F2d 1326, 1330. On FTCA and FAA liability, see §§2.14-2.15.

A pilot's contributory negligence may be shown to reduce damages in an action alleging design defects in an airplane. *McGee v Cessna Aircraft Co.* (1983) 139 CA3d 179, 184, 188 CR 542 (evidence relevant to aircraft's airworthiness, but not crashworthiness).

The defense may be raised against a guest riding in an airplane who knew or should have known that the pilot's ability was impaired by consumption of alcohol. See *Newing v Cheatham* (1975) 15 C3d 351, 366, 124 CR 193 (impairment not proved). See also *Dziura v California Aviation Serv.* (1970) 4 CA3d 191, 198, 84 CR 191 (contributory negligence not defense to cause of action alleging willful misconduct; but note that case predates adoption of comparative fault system; see §1.58).

Comparative indemnity principles (see §§1.62-1.68) apply in aviation injury cases. See *Mattschei v U.S.* (9th Cir 1979) 600 F2d 205, 209 (midair collision).

The concurrent negligence of persons other than the plaintiff and the defendant may also be shown under CC §1431.2 (Proposition 51) to reduce a defendant's liability for noneconomic damages. See *Johnson v Pratt & Whitney Canada, Inc.* (1994) 28 CA4th 613, 626, 34 CR2d 26 (defendant's evidence properly excluded as a discovery sanction). See §1.69 for more on Proposition 51.

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§2.31 B. Assumption of Risk; Exculpatory Agreements

The primary assumption of risk defense (see §1.46) does not bar recovery by the pilot of, or a passenger in, a small plane who alleges injury caused by an airstrip owner's negligence in designing and maintaining the airstrip. *Gordon v Havasu Palms, Inc.* (2001) 93 CA4th 244, 247, 112 CR2d 816 (private plane crash; airstrip owner had duty to users; irrelevant that crashing is a risk inherent in flying; see §2.12). Note that an assumption of risk that is not primary is secondary and is a form of contributory fault that may proportionally reduce damages. See §§1.43, 1.46.

An exculpatory agreement signed before the beginning of a sightseeing flight may, on the other hand, provide the plane's operator with a complete defense. See *Booth v Santa Barbara Biplane Tours, LLC* (2008) 158 CA4th 1173, 1178, 70 CR3d 660 (plaintiffs claimed injury during emergency landing after plane lost power; no allegations of gross negligence; preflight release negated negligence and breach of implied warranty causes of action).

Pre-1992 cases in which the assumption of risk defense was asserted include *Powell v Dell-Air Aviation, Inc.* (1968) 268 CA2d 451, 455, 74 CR 3 (failure to fasten seatbelt), and *Doyle v Hamren* (1966) 246 CA2d 733, 737, 55 CR 84 (no evidence of contributory negligence; passenger rode with licensed, experienced pilot). See also note in §2.30 on *Dziura v California Aviation Serv.* (1970) 4 CA3d 191, 198, 84 CR 191.

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§2.32 C. Statute of Limitations

From January 1, 2003, California personal injury and wrongful death claims are governed by the 2-year limitations period specified in CCP §335.1.

The 2-year period 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. The 2-year period also applies to a lawsuit that was pending in federal court on January 1, 2003, even though the injury occurred before 2002 and the federal suit was dismissed in July 2003, several weeks before the California suit was filed. *Mojica v 4311 Wilshire, LLC* (2005) 131 CA4th 1069, 31 CR3d 887. Otherwise, the former 1-year limitations period (see former CCP §340(3)) may be raised as a defense to bar a suit filed on or after January 1, 2003, for an injury (or death) that occurred before January 1, 2002. *Krupnick v Duke Energy Morro Bay LLC* (2004) 115 CA4th 1026, 9 CR3d 767.

NOTE: See generally Rahman, *Applying the New Two-Year Limitations Period for Personal Injury and Wrongful Death Claims,* 25 CEB Civ Litigation Rep 14 (Feb. 2003).

A provision in CCP §340.10 makes the 2-year period of CCP §335.1 applicable to injury and death resulting from "terrorist-related aircraft crashes of September 11, 2001."

NOTE: The California Supreme Court granted, then dismissed (after a settlement), review of a court of appeal ruling that a defendant was estopped from asserting a 3-year statute of limitations for damage to property by its insurer's failure to notify the claimant of that period. See *Northwest Airlines, Inc. v Ontario Aircraft Servs., Inc.* (review granted Apr. 9, 2003, and dismissed July 23, 2003, S113305; superseded opinion at 104 CA4th 1053, 129 CR2d 146). See also note in §2.12.

Actions brought within the Warsaw system (see §§2.22-2.29) must ordinarily be brought within 2 years of the date of arrival, intended arrival, or cessation of carriage.

See §2.10 on the 18-year statute of repose applicable to actions against aircraft manufacturers.

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3

Animals

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I. PERSONS LIABLE; THEORIES

§3.1 A. Keeper or Owner

A person who keeps or has control of an animal may be liable for injury, harm, or loss caused by the animal under the dangerous animal rule (see §§3.3, 3.6) and for negligence (see §§3.8-3.13). See *Talizin v Oak Creek Riding Club* (1959) 176 CA2d 429, 1 CR 514. A keeper is one who harbors, protects, or shelters the animal. *Buffington v Nicholson* (1947) 78 CA2d 37, 42, 177 P2d 51. See *Smith v Royer* (1919) 181 C 165, 169, 183 P 660 (head of household). The person need not be the owner. 181 C at 168; *Wilkinson v Parrott* (1867) 32 C 102; *Menches v Inglewood Humane Soc'y* (1942) 51 CA2d 415, 417, 124 P2d 870.

NOTE: This chapter covers injuries caused by animal conduct; it does not cover an owner's loss from injury to an animal caused by human conduct. See, *e.g., McMahon v Craig* (2009) 176 CA4th 222, 97 CR3d 555 (owner could not recover emotional distress or loss of companionship damages for dog that died while in veterinarian's care). See Anno, 91 ALR5th 545 (2001) (emotional distress resulting from treatment of pets and animals). See generally *When Fluffy Becomes White Fang: The Legal and Practical Aspects of Trying a Dog Mauling Case*, 34 CAOC Forum No. 9, p 9 (Consumer Attorneys of California), Nov. 2004.

An owner who retains some control over the animal remains liable even if the animal is partly under the care of others. *O'Rourke v Finch* (1908) 9 CA 324, 326, 99 P 392, 393. See Annos, 64 ALR4th 963 (1988) (who is owner or harborer of dog), 30 ALR4th 986 (1984) (owner's liability to person frightened by dog), 96 ALR3d 891 (1980) (injuries inflicted by animal as within coverage of homeowner's and personal liability policies).

The dog-bite statute (see §3.2) and some local leash laws (see §3.11) impose liability on the animal's owner. Ownership, if disputed, may be inferred from the fact that the defendant kept the animal and from other circumstances. *Ellsworth v Elite Dry Cleaners, Dyers & Laundry, Inc.* (1954) 127 CA2d 479, 483, 274 P2d 17, 19 (owner was listed on dog license, gave dog personal care and attention); *O'Rourke v Finch, supra* (defendant had initials on dog's collar, paid dog's expenses, walked dog frequently).

A police officer who uses a dog to assist in effecting an arrest may be liable under 42 USC §1983 for violating the civil rights of the arrestee bitten by the dog if the use amounts to excessive force. See *Watkins v City of Oakland* (9th Cir 1998) 145 F3d 1087. See also *Smith v City of Hemet* (9th Cir 2005) 394 F3d 689, 705 (rejecting, as too narrow, a definition of "excessive force" used in *Vera Cruz v City of Escondido* (9th Cir 1997) 139 F3d 659. A keeper or owner is not liable under 42 USC §1983 for police dog bites when the use of the dog in effecting an arrest was "objectively reasonable." *Mendoza v Block* (9th Cir 1994) 27 F3d 1357, 1362.

When livestock on a highway cause injuries (see §§3.12-3.13), liability is imposed on the owner or person in charge or control of the stock. See Food & A C §§16902-16903; *Olden v Babicora Dev. Co.* (1930) 107 CA 399, 290 P 1062 (liability of owner and employee). But see *Rutherford v Reilly* (1951) 104 CA2d 629, 630, 232 P2d 34, 35 (former bailee not responsible after owner resumes control).

On keeping a domestic animal as constituting a public or private nuisance, see Anno, 90 ALR5th 619 (2001).

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1. Strict Liability

§3.2 a. Dog-Bite Statute

Civil Code §3342(a) provides that the owner of a dog is liable for the damages suffered by anyone who is bitten by the dog while in a public place or lawfully in a private place, including the dog owner's property, regardless of the prior viciousness of the dog or the owner's knowledge of that viciousness. See *Goldberg v Rabuchin* (1944) 65 CA2d 111, 114, 149 P2d 861, 862 (owner's knowledge and negligence immaterial). A dog bite that causes injury is actionable under the statute even though the bite itself does not break the victim's skin or injure tissue. *Johnson v McMahan* (1998) 68 CA4th 173, 80 CR2d 173 (dog's jaws closed around plaintiff's leg, causing him to fall from ladder). Although CC §3342 provides for liability only of an owner and only for dog bites, it does not preclude recovery on other grounds from a nonowner, or for an attack without biting. See §§3.3-3.13.

NOTE: The supreme court has ruled that the veterinarian's rule, viewed as an aspect of the primary assumption of risk doctrine, can relieve a dog owner from dog-bite statute liability to a veterinarian or kennel worker. See §3.30.

The dog-bite statute imposes liability on the owner regardless of whether the dog is restrained or running loose when the bite occurs. *Davis v Gaschler* (1992) 11 CA4th 1392, 1399, 14 CR2d 679. *Davis* also held that the plaintiff's voluntary act of helping an injured dog found in a public place did not remove her from the class of persons protected by the statute.

A person is lawfully on the owner's private property who is there to perform a duty imposed by law or at the owner's express or implied invitation. CC §3342(a). An invitation implied from past occasions is sufficient (*Smythe v Schacht* (1949) 93 CA2d 315, 319, 209 P2d 114, 117), and a business or economic motive is not essential. See *DeLay v Braun* (1944) 63 CA2d 8, 10, 146 P2d 32, 33 (dictum; licensee). See Anno, 38 ALR4th 200 (1985) (adult social guest).

Strict liability is not imposed if the scope of the invitation is exceeded. *Fullerton v Conan* (1948) 87 CA2d 354, 358, 197 P2d 59, 61. A trespasser, even a child, cannot invoke the statute. *Bauman v Beaujean* (1966) 244 CA2d 384, 387, 53 CR 55, 58.

NOTE: Civil Code §3342(a) provides no defense to an owner criminally prosecuted for keeping, without ordinary care, or for willfully suffering to go at large, a mischievous animal that kills or seriously injures a person (see Pen C §399) or a fighting dog (see Pen C §597.5(a)(1)). See *People v Berry* (1991) 1 CA4th 778, 2 CR2d 416 (child killed by pit bull).

Civil Code §3342(b)-(d) limits the liability of governmental agencies using dogs in military or police work. The dog-bite statute does not apply if the biting occurs while the dog is (a) defending itself from an annoying, harassing, or provoking act, or (b) assisting a public employee in (1) apprehending or holding a suspect when the employee has a reasonable suspicion of the suspect's involvement in criminal activity, (2) investigating a crime or possible crime, (3) executing a warrant, or (4) defending a peace officer or other person. CC §3342(b). This immunity does not apply if the victim was not a party to, a participant in, nor suspected to be a party to or participant in, the act or acts that prompted the use of the dog in the military or police work. CC §3342(c). Further, this military and police immunity applies only when the governmental agency has adopted a written policy on the "necessary and appropriate use of a dog" for such work. CC §3342(d). See *City of Huntington Beach v City of Westminster* (1997) 57 CA4th 220, 66 CR2d 826 (indemnity rights between two cities when police dog deployed by one city bit robbery victim). See also 42 USC §1983 cases noted in §3.1.

A dog owner's automobile liability insurance policy does not ordinarily insure the owner against liability when his dog escaped and ran from a parked vehicle and bit a pedestrian. *State Farm Mut. Auto. Ins. Co. v Grisham* (2004) 122 CA4th 563, 18 CR3d 809.

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Source: Torts/California Tort Guide/3 Animals/§3.3 b. Dangerous Animal Rule; Known Dangerous Traits

§3.3 b. Dangerous Animal Rule; Known Dangerous Traits

The keeper (see definition in §3.1) of an animal of a species that is dangerous by nature, or that the keeper knows or has reason to know has dangerous propensities or traits, is strictly liable to anyone injured as a result of those propensities or traits. *Hillman v Garcia-Ruby* (1955) 44 C2d 625, 626, 283 P2d 1033 (dog jumped on people); *Northon v Schultz* (1955) 130 CA2d 488, 279 P2d 103 (same). See *Drake v Dean* (1993) 15 CA4th 915, 921, 19 CR2d 325 (quoting Restatement (Second) of Torts §509 (1977)); CACI 461 (2003), BAJI 6.65 (9th ed 2002).

This strict liability rule, unlike the dog-bite statute (see §3.2), extends to the following:

- Keepers other than owners (see *Buffington v Nicholson* (1947) 78 CA2d 37, 41, 177 P2d 51, 53 (keeper must know of animal's dangerousness));
- Animals other than dogs (see, *e.g., Gooding v Chutes Co.* (1909) 155 C 620, 623, 102 P 819, 821 (camel); *Clowdis v Fresno Flume & Irrig. Co.* (1897) 118 C 315, 320, 50 P 373, 374 (bull); *Rosenbloom v Hanour Corp.* (1998) 66 CA4th 1477, 78 CR2d 686 (shark; but see §3.29); *Bocker v Miller* (1963) 213 CA2d 345, 348, 28 CR 818, 821 (horse); *Baugh v Beatty* (1949) 91 CA2d 786, 790, 205 P2d 671, 674 (chimpanzee); Annos, 85 ALR2d 1161 (1962) (injuries by horses), 68 ALR4th 823 (1989) (injury caused by cat)); and
- Animal actions other than biting (see §3.4).

Although dangerous propensities are generally deemed abnormal to dogs as a class, the strict liability rule is applicable if a particular dog has dangerous propensities of which the owner or keeper knows or has reason to know. See *Drake v Dean, supra* (fact issues in suit for injuries caused by pit bull); *Frederickson v Kepner* (1947) 82 CA2d 905, 908, 187 P2d 800, 802 (nonsuit reversed when customer attacked by defendant's large guard dog); *Hicks v Sullivan* (1932) 122 CA 635, 10 P2d 516 (affirming judgment for plaintiff in attack by "vicious and ill-tempered" dog). See Anno, 80 ALR4th 70 (1990) (on statutes, etc., relating to specific breeds such as pit bulls). The owner is not strictly liable for keeping dogs alleged to be "of a vicious disposition" if they were secured behind a fence on the owner's property. *Nava v McMillan* (1981) 123 CA3d 262, 267, 176 CR 473 (pedestrian alleged that dogs frightened her, causing her to step from sidewalk into street where car hit her).

NOTE: The supreme court has ruled that it is a question of fact whether a dog owner has given a veterinarian or kennel worker sufficient warning of a dog's previous biting to avoid dangerous animal liability. See *Priebe v Nelson* (2006) 39 C4th 1112, 1116, 47 CR3d 553, which also concerned the veterinarian's rule (see §3.30).

The keeper's liability is said to be absolute in the sense that the gist of the action is not how the animal was kept, but that it was kept at all in light of its dangerous propensities; a plaintiff who can prove the animal's dangerous nature or trait and the keeper's knowledge of it, need not prove negligence in failing to restrain or confine it. See *Hillman v Garcia-Ruby, supra*; *Talizin v Oak Creek Riding Club* (1959) 176 CA2d 429, 437, 1 CR 514, 518 (show horse with history of jumping out of ring); *Opelt v Al. G. Barnes Co.* (1919) 41 CA 776, 778, 183 P 241, 242 (wild animal). On the other hand, liability is said not to be absolute in the sense that the plaintiff's assumption of risk may provide the keeper with a complete defense. *Rosenbloom v Hanour Corp.* (1998) 66 CA4th 1477, 78 CR2d 686 (shark owner not liable to bitten employee of company keeper hired to move shark; see §3.29).

If the injury occurred on the defendant's premises, the plaintiff's status as a trespasser, licensee, or social guest should not preclude holding the defendant liable for keeping a dangerous animal, as long as the plaintiff's presence was or should have been known. *Northon v Schultz, supra* (liability to licensee for active conduct). See Anno, 64 ALR3d 1039 (1975) (liability of owner of known vicious dog to trespasser). See also *Rowland v Christian* (1968) 69 C2d 108, 119, 70 CR 97, 104 (status distinctions no longer decisive in premises cases).

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Source: Torts/California Tort Guide/3 Animals/§3.4 (1) Traits Other Than Biting

§3.4 (1) Traits Other Than Biting

A dog may be dangerous if it has a propensity to attack or otherwise injure people by any means, not just biting. *Northon v Schultz* (1955) 130 CA2d 488, 279 P2d 103 (dog jumped on people); *Frederickson v Kepner* (1947) 82 CA2d 905, 908, 187 P2d 800, 802 (watchdog's long leash tripped patron); *Hicks v Sullivan* (1932) 122 CA 635, 10 P2d 516 (muzzled dog knocked woman down). The trait, however, must have been previously manifested. *Hagen v Laursen* (1953) 121 CA2d 379, 383, 263 P2d 489, 492 (no liability when playing dog inadvertently ran into plaintiff; disapproved, to extent of its failure to distinguish between strict liability and negligence, in *Drake v Dean* (1993) 15 CA4th 915, 919, 19 CR2d 325).

Any trait of a domestic animal that is likely to cause injury to anyone may render the animal dangerous even if it has no propensity to attack people. *Bocker v Miller* (1963) 213 CA2d 345, 349, 28 CR 818, 821 (horse's tendency to rear); *Talizin v Oak Creek Riding Club* (1959) 176 CA2d 429, 435, 1 CR 514, 519 (horse's propensity to jump out of show ring); *Heath v Fruzia* (1942) 50 CA2d 598, 600, 123 P2d 560, 562 (horse's habit of kicking at other horses).

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(2) Knowledge of Trait

§3.5 (a) Proof

The keeper of a wild animal is presumed to know that it is ferocious by nature. *Baugh v Beatty* (1949) 91 CA2d 786, 791, 205 P2d 671, 674 (chimpanzee). See Anno, 21 ALR3d 603 (1968) (liability of owner or keeper of wild animal).

The dangerousness of a domestic animal and the keeper's notice or knowledge of it must be proved by evidence other than the mere happening of the accident. *Finney v Curtis* (1889) 78 C 498, 501, 21 P 120, 121 (horse's single act of viciousness); *Mann v Stanley* (1956) 141 CA2d 438, 444, 296 P2d 921, 924 (bull had not acted viciously before); *O'Brien v Gateway Stables* (1951) 104 CA2d 317, 319, 231 P2d 524, 525 (horse had history of gentle behavior).

A dog's dangerous character may be evidenced by its size or breed or by the fact that it was chained or muzzled or was trained or used as a watchdog. *Bulow v Dawn Patrol* (1963) 216 CA2d 721, 728, 31 CR 132, 136 (trained watchdog); *Frederickson v Kepner* (1947) 82 CA2d 905, 908, 187 P2d 800, 802 (75-pound watchdog on long rope); *Davis v Mene* (1921) 52 CA 368, 198 P 840 (bulldog was chained at home and muzzled at large).

Notice or knowledge may be shown by previous incidents or accidents involving the animal, of which the defendant should have been aware. *Bocker v Miller* (1963) 213 CA2d 345, 348, 28 CR 818, 821 (horse had caused prior accidents); *Talizin v Oak Creek Riding Club* (1959) 176 CA2d 429, 434, 1 CR 514, 517 (show horse had jumped out of ring before); *Northon v Schultz* (1955) 130 CA2d 488, 489, 279 P2d 103, 104 (dog in habit of jumping on visitors); *Hicks v Sullivan* (1932) 122 CA 635, 10 P2d 516 (after previous attacks, police required that dog be muzzled).

The prior incidents need not have been precisely the same as the one causing the accident if they showed the animal's bad disposition. *Bocker v Miller, supra*; *Heath v Fruzia* (1942) 50 CA2d 598, 601, 123 P2d 560, 562 (horse had attacked people and horses); *Hicks v Sullivan, supra*. However, there must be some relationship between the previous conduct and the conduct that injured the plaintiff. *Chandler v Vaccaro* (1959) 167 CA2d 786, 789, 334 P2d 998, 1000 (fact that dog chased people away while nursing does not show danger at other times); *Hensley v McBride* (1931) 112 CA 50, 296 P 316 (previous dogfights do not show danger to people).

A keeper's statements about the animal and his or her manner of handling and using it may also show the keeper's knowledge of its dangerous propensities. See *Drake v Dean* (1993) 15 CA4th 915, 920, 19 CR2d 325; *Bulow v Dawn Patrol, supra; Hicks v Sullivan, supra; Bocker v Miller, supra*.

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Source: Torts/California Tort Guide/3 Animals/§3.6 (b) Constructive and Imputed Knowledge

§3.6 (b) Constructive and Imputed Knowledge

An owner or a keeper is charged with notice of facts that

- he could have learned by reasonable inquiry (*Talizin v Oak Creek Riding Club* (1959) 176 CA2d 429, 437, 1 CR 514, 519; but see *Mann v Stanley* (1956) 141 CA2d 438, 443, 296 P2d 921, 925), or
- his employees, agents, partners, or family knew (*Smith v Royer* (1919) 181 C 165, 170, 183 P 660, 662 (wife); *Barrett v Metropolitan Contracting Co.* (1916) 172 C 116, 119, 155 P 645, 646 (stable employee); *Gooding v Chutes Co.* (1909) 155 C 620, 625, 102 P 819, 821 (zoo employee); *Clowdis v Fresno Flume & Irrig. Co.* (1897) 118 C 315, 320, 50 P 373, 374 (cattle drivers); *Bulow v Dawn Patrol* (1963) 216 CA2d 721, 728, 31 CR 132, 136 (employee); *Roos v Loeser* (1919) 41 CA 782, 785, 183 P 204, 205 (same)).

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§3.7 c. Trespassing Animals

Except, perhaps, in counties designated as grazing or open range counties (see Food & A C §§17121-17128), anyone who owns or has possession or control of livestock is strictly liable for personal injuries and property damage caused by the animal's trespassing on property occupied by another. There is no need to show that the animal was dangerous (see §3.3) or that the owner had knowledge of dangerous traits (see §3.5). *Williams v Goodwin* (1974) 41 CA3d 496, 116 CR 200 (plaintiff knocked down and trampled by trespassing bull). See Anno, 49 ALR4th 710 (1986) (liability for personal injury or death caused by trespassing livestock).

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Source: Torts/California Tort Guide/3 Animals/§3.8 2. Negligence

§3.8 2. Negligence

Liability of an animal's owner or keeper may be based on negligence whether or not the animal is known to be vicious. *Barnett v La Mesa Post No. 282* (1940) 15 C2d 191, 104, 99 P2d 650, 651 (failure to manage horse); *Talizin v Oak Creek Riding Club* (1959) 176 CA2d 429, 435, 1 CR 514, 519 (horse known to have dangerous trait). See Anno, 85 ALR2d 1161, 1171 (1962) (injuries by horses; negligence).

Negligence may be based on the characteristics of an animal that, although not abnormal to its class, create a foreseeable risk of harm. The owner has a duty to anticipate harm from such characteristics and to exercise ordinary care to prevent it. *Drake v Dean* (1993) 15 CA4th 915, 929, 19 CR2d 325. See *Talizin v Oak Creek Riding Club, supra*.

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Source: Torts/California Tort Guide/3 Animals/§3.9 a. Failure to Warn, Restrain, or Control

§3.9 a. Failure to Warn, Restrain, or Control

A defendant's negligence may consist in such conduct as the following:

- Failing to warn of the animal's dangerous trait (*Dolieslager v Excelsior Farms* (1964) 225 CA2d 565, 568, 37 CR 567, 568 (bull's tendency to buck when being led); but see *Hagen v Laursen* (1953) 121 CA2d 379, 383, 263 P2d 489, 491 (no duty to warn of dogs' normal antics; disapproved, to extent of its failure to distinguish between strict liability and negligence, in *Drake v Dean* (1993) 15 CA4th 915, 19 CR2d 325));
- Failing to ascertain whether the animal has a dangerous propensity (*Talizin v Oak Creek Riding Club* (1959) 176 CA2d 429, 435, 1 CR 514, 517, 519);
- Failing to restrain a dangerous animal (*Clowdis v Fresno Flume & Irrig. Co.* (1897) 118 C 315, 321, 50 P 373, 374) or an animal with a dangerous habit (*Drake v Dean* (1993) 15 CA4th 915, 931, 19 CR2d 325);
- Failing to provide for or exercise control over an animal even if it had not previously manifested a dangerous trait (*Barnett v La Mesa Post No. 282* (1940) 15 C2d 191, 194, 99 P2d 650, 651 (horse became unruly and struck bystander); *Baley v J.F. Hink & Son* (1955) 133 CA2d 102, 108, 283 P2d 349, 353 (dog on leash ran between shopper's legs)); or
- Engaging in conduct likely to excite the animal (*Darnold v Voges* (1956) 143 CA2d 230, 243, 300 P2d 255, 260).

The owner is not negligent in failing to warn of an unknown danger of which he could not reasonably be expected to know. *Butcher v Gay* (1994) 29 CA4th 388, 405, 34 CR2d 771 (no reasonable means of knowing that dog had ticks carrying Lyme disease). See *Nava v McMillan* (1981) 123 CA3d 262, 266, 176 CR 473 (owner not negligent in keeping dogs on own property behind secure fences when pedestrian alleged that dogs frightened her into stepping off sidewalk into street where she was struck by car).

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Source: Torts/California Tort Guide/3 Animals/§3.10 b. Failure to Vaccinate Dog for Rabies

§3.10 b. Failure to Vaccinate Dog for Rabies

Health and Safety Code §12169 requires every dog owner to have the dog vaccinated against rabies at 4 months of age and at prescribed intervals thereafter. Violation of the rabies law, which proximately causes injury to another, may give rise to a presumption of negligence under Evid C §669(a) (discussed in §§1.31-1.34). *Davis v Gaschler* (1992) 11 CA4th 1392, 1400, 14 CR2d 679 (plaintiff had inoculations for rabies when initial tests were equivocal; later tests were negative).

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§3.11 c. Violation of Local Leash Law

Local authorities may, by ordinance, require dog owners to keep their dogs under leash control whenever they leave their own premises. See CC §3342.5(e). Such an ordinance imposes a positive duty on owners to prevent unleashed dogs from leaving the owner's premises. The ordinance is violated if the owner fails to take the necessary preventive action whether or not the owner acted willfully. In either event, the violation is negligence per se under Evid C §669(a) (discussed in §§1.31-1.34). *Delfino v Sloan* (1993) 20 CA4th 1429, 1438, 25 CR2d 265. See Anno, 1 ALR4th 994 (1980) (construction and application of local animal restraint laws).

Violation of a leash law may constitute actionable negligence if, *e.g.,* the dog interferes with one of the following:

- Vehicle operators (*Brotemarkle v Snyder* (1950) 99 CA2d 388, 390, 221 P2d 992, 993; see Anno, 41 ALR3d 888 (1972) (auto accidents from operators' trying not to hit dog on highway));
- A bicycle rider (*Delfino v Sloan, supra*); or
- A pedestrian (*Rollins v Hedin* (1952) 114 CA2d 488, 490, 250 P2d 728, 729).

A causal connection must be shown. *Hagen v Laursen* (1953) 121 CA2d 379, 385, 263 P2d 489, 493 (statute forbidding night roaming does not protect dog owner's visitors; disapproved, to extent of its failure to distinguish between strict liability and negligence, in *Drake v Dean* (1993) 15 CA4th 915, 19 CR2d 325); *Eigner v Race* (1942) 54 CA2d 506, 512, 129 P2d 444, 447 (violation of local leash law not a contributing cause).

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Source: Torts/California Tort Guide/3 Animals/ d. Livestock on Highway/§3.12 (1) Duty to Keep Highway Clear

d. Livestock on Highway

§3.12 (1) Duty to Keep Highway Clear

A person who owns or controls livestock has a duty to use due care to keep the animals from straying onto public highways, whether the animals are

- fenced (Food & A C §16902; see *Davert v Larson* (1985) 163 CA3d 407, 410, 209 CR 445 (horse that caused car accident had escaped through hole in fence); *Jackson v Hardy* (1945) 70 CA2d 6, 14, 160 P2d 161, 165)); or
- unfenced or in open range country (*Shively v Dye Creek Cattle Co.* (1994) 29 CA4th 1620, 1632, 35 CR2d 238; *Summers v Parker* (1953) 119 CA2d 214, 216, 259 P2d 59, 60; *Jackson v Hardy, supra*; see *Galeppi Bros. v Bartlett* (9th Cir 1941) 120 F2d 208, 210; *Anderson v I.M. Jameson Corp.* (1936) 7 C2d 60, 68, 59 P2d 962, 966).

See also *Sea Horse Ranch, Inc. v Superior Court* (1994) 24 CA4th 446, 30 CR2d 681 (criminal prosecution for fatal collision with horse on highway); *Curtis v State* (1982) 128 CA3d 668, 691, 180 CR 843 (vehicle on freeway hit cow that had gone through negligently built fence). See Annos, 40 ALR4th 823 (state liability for negligent construction and maintenance of freeway fence).

Case law has extended a duty of care to the owner of a share in common areas of a "recreational community." See *Davert v Larson, supra.* But see CC §1365.9, added in 1994, which limits liability in specified circumstances to the association to which the share owner belongs. Under Food & A C §§17123-17124, persons grazing cattle in counties "devoted chiefly to grazing" (or "open range" counties) are not required to fence in their cattle. However, the "open range" law does not exempt cattle owners from the duty, under CC §1714, to use ordinary care in managing their property. See §§1.4, 1.6 on duty. The exercise of ordinary care may require safety measures other than fencing, such as additional herders, moving the sources of feed and water, or moving the cattle to other areas. *Shively v Dye Creek Cattle Co.* (1994) 29 CA4th 1620, 1633, 35 CR2d 238.

Failure of a person who is driving livestock on a highway at night to have sufficient herders on duty to keep the road open for vehicles is an additional ground of liability. See Food & A C §16903 (driving livestock at night); *Olden v Babicora Dev. Co.* (1930) 107 CA 399, 407, 290 P 1062, 1066 (herder must use due care in addition to obeying statute).

See Annos, 52 ALR4th 1200 (1987) (governmental entity liability for injury resulting from vehicular collision with domestic animal on street or highway), 49 ALR4th 653 (1986) (liability for injury resulting from collision with horse), 29 ALR4th 431 (1984) and 21 ALR4th 132, 159 (1983) (liability for collision caused by domestic animal in street or highway).

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Source: Torts/California Tort Guide/3 Animals/§3.13 (2) Proof of Negligence

§3.13 (2) Proof of Negligence

There is no longer a presumption or inference of negligence of the owner or person in charge of a domestic animal when a collision occurs between the animal and a motor vehicle on a highway. Food & A C §16904; *Shively v Dye Creek Cattle Co.* (1994) 29 CA4th 1620, 35 CR2d 238. See *Pepper v Bishop* (1961) 194 CA2d 731, 733, 15 CR 346, 348, which traces the legislative history.

Section 16904 precludes reliance on res ipsa loquitur; the plaintiff must prove negligence by evidence beyond the mere presence of livestock on the road. See *Shively v Dye Creek Cattle Co.* (1994) 29 CA4th 1620, 1625, 35 CR2d 238 (evidence of numerous collisions with defendant's cattle on state highway where cattle crossed for shade, food, and water); *Jackson v Hardy* (1945) 70 CA2d 6, 15, 160 P2d 161, 166 (cattle left unattended near roadway); *Burnett v Reyes* (1953) 118 CA2d Supp 878, 880, 256 P2d 91, 93 (defendant burned fence around cow pasture). However, inferences may be drawn from the evidence (*Pepper v Bishop* (1961) 194 CA2d 731, 734, 15 CR 346, 348), and circumstantial evidence of negligence and causation may be sufficient. *Jackson v Hardy, supra*. See also *Summers v Parker* (1953) 119 CA2d 214, 217, 259 P2d 59, 60 (not essential to prove precisely how animal escaped).

Negligence may consist of failure to provide adequate fences or gates or sufficient herders, or in leaving gates open. See *Anderson v I.M. Jameson Corp.* (1936) 7 C2d 60, 68, 59 P2d 962, 966; *Kenney v Antonetti* (1931) 211 C 336, 338, 295 P 341, 342 (horse had escaped other times). See also *Sea Horse Ranch, Inc. v Superior Court* (1994) 24 CA4th 446, 455, 30 CR2d 681 (poor fence; horses continually escaped onto state highway); *Curtis v State* (1982) 128 CA3d 668, 691, 180 CR 843 (freeway fence staples on wrong side of posts); *Summers v Parker, supra*; *Jackson v Hardy, supra*; *Shively v Dye Creek Cattle Co., supra* (safety measures in "open range" counties). Negligence should not be found when adequate fences and gates were provided and the stock unforeseeably escaped by breaking a gate. See *Pepper v Bishop, supra*.

Negligent failure to maintain a fence is not sufficient to justify punitive damages against the animal owner; proof of a conscious disregard of a known defect is essential. *Woolstrum v Mailloux* (1983) 141 CA3d Supp 1, 12, 190 CR 729.

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§3.14 B. Owner's Employer

An employer is subject to respondeat superior liability for injuries caused by an animal kept by an employee if the employee uses the animal in the course of employment by the owner. *Bulow v Dawn Patrol* (1963) 216 CA2d 721, 728, 31 CR 132, 137 (watchman used own guard dog). The employer is not liable if the employee keeps the animal only as a pet. *Baker v Kinsey* (1869) 38 C 631, 633.

An employer who permits an employee to bring a dog onto the employer's property can be liable for injury resulting from the dog's attack on a person lawfully on that property. *Salinas v Martin* (2008) 166 CA4th 404, 82 CR3d 735 (unlike ordinary landlord/tenant situations (see §3.15), employer need not have had prior knowledge of dog's dangerous propensities).

There are differing decisions on whether the United States is liable under the Federal Tort Claims Act (28 USC §§1346(b), 2671-2680) for injuries inflicted by a service person's dog kept on a military base. Compare *Lutz v U.S.* (9th Cir 1982) 685 F2d 1178 (airman who failed to control pet malamute was "acting in the line of duty" and within the scope of employment) with *Piper v U.S.* (8th Cir 1989) 887 F2d 861 (United States not liable for injuries caused by serviceman's dog on airbase, because his violation of regulations in failing to control dog was not "in the line of duty"; court declined to follow *Lutz,* but suggested possibility of liability based on negligent performance of duties by airbase personnel).

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C. Owner's Landlord

§3.15 1. Injury on Premises

A landlord may be liable for an attack on a visitor by a tenant's dangerous dog if the landlord had actual knowledge of the presence and dangerous propensities of the dog and had sufficient control of the premises to require the dog's removal. *Uccello v Laudenslayer* (1975) 44 CA3d 504, 512, 118 CR 741 (attack on young girl by tenant's German shepherd; landlord had seen dog on premises and neighbors had complained about dog's vicious behavior). See Anno, 87 ALR4th 1004 (1991) (landlord's liability for on-premises injury caused by tenant's dangerous or vicious animal). See note on *Wylie* in §3.16.

Liability may be imposed on a landlord who had actual knowledge of the presence of the dog and its dangerous propensities. *Yuzon v Collins* (2004) 116 CA4th 149, 10 CR3d 18 (landlord's knowledge that tenant had a dog does not, it itself, mean he knew of its dangerous propensities); *Portillo v Aiassa* (1994) 27 CA4th 1128, 32 CR2d 755; *Lundy v California Realty* (1985) 170 CA3d 813, 821, 216 CR 575 (knowledge not proved solely by evidence that tenant kept German shepherd named "Thunder" on unfenced premises). An inference of the landlord's actual knowledge may be drawn, however, if the circumstances are such that the defendant must or should have had knowledge of the dog's vicious propensities; *Uccello v Laudenslayer* (1975) 44 CA3d 504, 514 n4, 118 CR 741. See *Donchin v Guerrero* (1995) 34 CA4th 1832, 1839, 1947, 41 CR2d 192 (off-premises injury; landlord's false statements, that he did not know tenant had dogs, may give rise to inference of guilty conscience); *Radoff v Hunter* (1958) 158 CA2d 770, 773, 323 P2d 202 (knowledge inferable from dog's general reputation, breed, size, and way it was kept). See also *Chee v Amanda Goldt Prop. Mgmt.* (2006) 143 CA4th 1360, 50 CR3d 40 (declaration of covenants, conditions, and restrictions applicable to owner and to manager of condominium complex no basis for liability to one condominium unit owner knocked down by another owner's dog).

The actual knowledge of the dog's dangerous propensities that must be proved in ordinary landlord/tenant situations need not be shown in suits against property owners who permit workers and others to bring dogs onto property over which the owner has retained control. See *Salinas v Martin* (2008) 166 CA4th 404, 82 CR3d 735, discussed in §3.14 (owner with unfettered ability to prevent dangerous condition owed duty of ordinary care to invitee).

It must also be shown that the landlord had the power or ability to prevent the injury through control over the property or the tenant. See *Martinez v Bank of America* (2000) 82 CA4th 883, 98 CR2d 576 (bank that foreclosed on property not liable for death caused by dogs owned by previous owners who still occupied it); *Uccello v Laudenslayer* (1975) 44 CA3d 504, 512, 118 CR 741 (ability to terminate monthly tenancy was sufficient control).

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§3.16 2. Injury off Premises

A landlord is subject to liability if a tenant's dog caused injury to the plaintiff off the landlord's premises and if the landlord could have prevented the injury by repairing a fence or terminating the dog owner's monthly tenancy. *Donchin v Guerrero* (1995) 34 CA4th 1832, 1839, 1947, 41 CR2d 192 (attack occurred four blocks from defendant's property, after dog's escape, apparently on public street). See Anno, 89 ALR4th 374 (1991) (landlord's liability for off-premises injury caused by tenant's dangerous or vicious animal).

On the other hand, a landlord ordinarily has no duty to warn a prospective tenant of the presence of a vicious dog in the neighborhood. See *Wylie v Gresch* (1987) 191 CA3d 412, 414, 236 CR 552 (dog owned by adjacent neighbors; complaint ambiguous as to whether dog was on defendant's property when it bit plaintiff).

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§3.17 D. Seller; Bailor

A seller's or bailor's failure to warn of the dangerous nature or trait of an animal subjects the seller or bailor to liability for any resulting injury to the buyer or bailee. See *Buffington v Nicholson* (1947) 78 CA2d 37, 42, 177 P2d 51, 54. The plaintiff must prove, however, that the defendant knew of (or should have discovered) the danger. See *Menches v Inglewood Humane Soc'y* (1942) 51 CA2d 415, 418, 124 P2d 870, 872.

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§3.18 E. Business or Entity That Permits Animals on Premises

The owner of a business establishment must use reasonable care to protect customers from harm caused by animals that he permits other patrons to bring on the premises. *Baley v J.F. Hink & Son* (1955) 133 CA2d 102, 111, 283 P2d 349, 354. But see *Martinez v Bank of America* (2000) 82 CA4th 883, 98 CR2d 576 (bank that foreclosed on property not liable for death caused by dogs owned by previous owners who still occupied it). See also *Cody F. v Falletti* (2001) 92 CA4th 1232, 1236, 112 CR2d 593 (subdivision association that had easement over road bordering dog owner's property not liable to boy injured by dogs; association had no responsibility to control dogs or owner's property).

See Annos, 69 ALR5th 599 (1999) (liability for injury inflicted by horse, dog, or other domestic animal exhibited at show), 67 ALR4th 976 (1989) (business owner's or proprietor's liability for injury to patron by dog or cat), 48 ALR3d 1257 (1973) (injury by small animal or insect to business patron), 17 ALR2d 459 (1951) (injury to patron at public resort). See also §§3.8-3.9.

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Source: Torts/California Tort Guide/3 Animals/§3.19 F. Carrier

§3.19 F. Carrier

A person who uses animals to transport people may be treated as a "carrier of persons for reward" who must use the utmost care and diligence to assure their safe carriage. See *McIntyre v Smoke Tree Ranch Stables* (1962) 205 CA2d 489, 23 CR 339 (mule pack train); *Kohl v Disneyland, Inc.* (1962) 201 CA2d 780, 20 CR 367 (horse-drawn surrey as amusement park ride). See also discussion in §§5.6-5.8.

NOTE: See discussion in §5.3 of *Webster v Ebright* (1992) 3 CA4th 784, 787, 4 CR2d 714 (stablekeeper who rents horses for recreational riding on nearby trails does not owe duty to use utmost care for rider's safety).

The duty of utmost care toward fare-paying passengers requires the carrier to inquire about the nature of any animal allowed in passenger sections and to provide for its adequate supervision. *Westwater v Southern Pac. Co.* (1940) 38 CA2d 369, 371, 101 P2d 154, 155; Anno, 17 ALR2d 459, 465 (1951) (carrier's liability to patron injured by animal or insect).

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G. Stablekeeper Furnishing Horses

1. Furnishing Safe and Suitable Horse

§3.20 a. Duty to Determine Suitability

A stablekeeper (1) must use reasonable care to learn the habits and dispositions of the horses kept for hire, (2) impliedly warrants that he or she has performed that duty and that the horse is safe and suitable for the particular rider, and (3) is liable for injuries caused by the dangerous or unsuitable nature or traits of a horse the keeper knew or should have known was dangerous or unsuitable. *Palmquist v Mercer* (1954) 43 C2d 92, 99, 272 P2d 26, 30 (horse known to be difficult to control); *Kersten v Young* (1942) 52 CA2d 1, 6, 125 P2d 501, 503 ("well reined" but touchy horse). See *Giardino v Brown* (2002) 98 CA4th 820, 834, 120 CR2d 77 (furnishing spirited horse to novice rider in her first week at Girl Scout camp negated assumption of risk defense; see §1.46). See Anno, 6 ALR4th 358 (1981) (liability to hirer or bailee of horse).

Although the stablekeeper's duty arises from a contract of bailment and is expressed in terms of implied warranty, the liability is not absolute. It is based on knowledge of unsuitability, or on negligence in determining suitability. The stablekeeper assumes a contractual obligation not to hire out a horse heedlessly without using reasonable care to ascertain and warn of its habits, nature, or suitability. *Dam v Lake Aliso Riding Sch.* (1936) 6 C2d 395, 400, 57 P2d 1315, 1318. There is, however, no duty to provide "ideal" riding horses that never spook, make sudden movements, or otherwise exhibit the inherent traits of horses. *Harrold v Rolling J Ranch* (1993) 19 CA4th 578, 584, 23 CR2d 671 (injury caused by sudden movement of horse was inherent risk of riding; recovery barred by primary assumption of risk). See §3.31 on primary assumption of risk.

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Source: Torts/California Tort Guide/3 Animals/§3.21 b. Proving Knowledge or Negligence

§3.21 b. Proving Knowledge or Negligence

Evidence required to establish a stablekeeper's liability may include the following:

- Expert testimony that an experienced horseman could have discovered the horse's dangerous characteristics by proper observation (*Dorobek v Ride-A-While Stables* (1968) 262 CA2d 554, 561, 68 CR 774, 776);
- Evidence that earlier misbehavior was observed by or reported to the stablekeeper (*Kersten v Young* (1942) 52 CA2d 1, 5, 125 P2d 501, 503); and
- Evidence that the rider claimed (or showed) inexperience and asked for a gentle horse but was given a high-spirited one (*Palmquist v Mercer* (1954) 43 C2d 92, 95, 272 P2d 26, 28).

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§3.22 c. Effect of Warning

The stablekeeper may discharge the duty to provide a suitable horse by adequately warning the rider of the horse's nature and habits and of the need for skillful handling. See *Kersten v Young* (1942) 52 CA2d 1, 6, 125 P2d 501, 505.

See discussion of various forms of assumption of risk by the rider in §§3.28, 3.31-3.32.

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§3.23 2. Care in Saddling; Safe Equipment

A stablekeeper and stable employees must use reasonable care in saddling horses that are furnished to riders, and the saddle and other equipment must be in safe condition. See *Rafter v Dubrock's Riding Academy* (1946) 75 CA2d 621, 627, 171 P2d 459, 462. Furnishing horses and saddling horses for others to ride are not, however, inherently dangerous activities that require a stablekeeper to exercise extreme caution. *Griffin v Sardella* (1967) 253 CA2d 937, 943, 61 CR 834, 839.

Proof that the saddle on a rented horse slipped during a ride permits the rider to invoke res ipsa loquitur (Evid C §646; see §1.35) if the factual bases for that doctrine are present. See *Rafter v Dubrock's Riding Academy, supra*; *Griffin v Sardella* (1967) 253 CA2d 937, 940, 61 CR 834, 837 (doctrine properly rejected). See also *McComas v Al. G. Barnes Shows Co.* (1932) 215 C 685, 697, 12 P2d 630, 635 (howdah on elephant slipped, throwing rider to ground).

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§3.24 H. Liability of Instructors and Trainers

As a general rule, persons acting as coaches, instructors, or trainers in connection with a sport or recreational activity can be liable for (1) intentionally injuring the student or (2) engaging in conduct that is totally outside the range of the ordinary activity involved in teaching or coaching the sport. See §1.59. Thus, a riding instructor can be liable for conduct that increases the risks inherent in learning the sport being coached. See, *e.g., Galardi v Seahorse Riding Club* (1993) 16 CA4th 817, 823, 20 CR2d 270 (student, practicing one-stride jumping, fell when horse failed to clear jump after instructor had twice raised heights without increasing intervals; instructor also directed plaintiff to ride through course in reverse direction; primary assumption of risk not complete defense); *Tan v Goddard* (1993) 13 CA4th 1528, 1534, 17 CR2d 89 (student directed to ride horse with injured foot on rocky training track; horse fell after stepping on object in track). See *Kahn v East Side Union High Sch. Dist.* (2003) 31 C4th 990, 1006, 4 CR3d 103 (commenting on, without expressly overruling or disapproving, *Galardi* and *Tan*; also noted in §1.59). See also *Knight v Jewett* (1992) 3 C4th 296, 319, 11 CR2d 2 (duties of instructors or coaches may differ from duties of coparticipants).

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II. DEFENSES

§3.25 A. Statute of Limitations

From January 1, 2003, personal injury and wrongful death claims are governed by the 2-year limitations period specified in CCP §335.1. An action for injury or death caused by an animal is normally governed by this period. See *Pritchard v Sharp* (1974) 41 CA3d 530, 116 CR 9 (fact that plaintiff sued under the dog-bite statute, CC §3342, did not permit application of CCP §338(a), which permitted actions on liability created by statute to be filed within 3 years).

See §2.23 on the retroactivity of the 2-year period adopted by CCP §335.1.

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B. Contributory Negligence

§3.26 1. As Defense to Strict Liability Cause of Action

Since the adoption of the comparative fault system (see §1.41), the owner or keeper of an animal who is sued under one of the strict liability theories discussed in §§3.2-3.7 may argue that the plaintiff's recovery should be reduced in proportion to the plaintiff's contributory fault. The owner or keeper would note that contributory negligence is a defense in strict product liability cases. See §11.42.

Cases that were decided before the advent of comparative negligence include the following:

- *Dog-bite statute: Gomes v Byrne* (1959) 51 C2d 418, 420, 333 P2d 754, 755 (court applied assumption of risk); *Burden v Globerson* (1967) 252 CA2d 468, 470, 60 CR 632, 634 (dictum that contributory negligence is defense); *Bauman v Beaujean* (1966) 244 CA2d 384, 390, 53 CR 55, 58 (same); *Smythe v Schacht* (1949) 93 CA2d 315, 322, 209 P2d 114, 118 (more than ordinary contributory negligence needed); see Anno, 11 ALR5th 127 (1993) (defenses to actions for injury by dogs);
- *Dangerous animal rule: Bocker v Miller* (1963) 213 CA2d 345, 349, 28 CR 818, 821 (contributory negligence a jury question); *Talizin v Oak Creek Riding Club* (1959) 176 CA2d 429, 438, 1 CR 514, 519 (doubt that contributory negligence a defense); *Frederickson v Kepner* (1947) 82 CA2d 905, 909, 187 P2d 800, 802 (same); *Eigner v Race* (1942) 54 CA2d 506, 511, 129 P2d 444, 446 (no evidence of contributory negligence).

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§3.27 2. As Defense to Negligence Cause of Action

The plaintiff's own negligence is a defense to causes of action based on the defendant's negligence. See *Talizin v Oak Creek Riding Club* (1959) 176 CA2d 429, 439, 1 CR 514, 619 (standing near exercise ring not contributory negligence). See also *Kersten v Young* (1942) 52 CA2d 1, 6, 125 P2d 501, 504 (remaining on horse after it shied). See §1.41 on comparative fault. See Annos, 11 ALR5th 127 (1993), 6 ALR4th 358 (1981), 85 ALR2d 1161 (1962).

Collisions between livestock and vehicles usually present factual questions on contributory negligence, depending on speed, visibility, physical conditions, braking, and the like. See *Anderson v I.M. Jameson Corp.* (1936) 7 C2d 60, 71, 59 P2d 962, 968; *Pepper v Bishop* (1961) 194 CA2d 731, 735, 15 CR 346, 347; *Olden v Babicora Dev. Co.* (1930) 107 CA 399, 414, 290 P 1062, 1069.

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§3.28 3. Secondary Assumption of Risk

A plaintiff's conduct that amounts to "secondary" assumption of risk is a variety of contributory fault (see §1.43); liability is determined under comparative fault principles. See *Galardi v Seahorse Riding Club* (1993) 16 CA4th 817, 823, 20 CR2d 270 (noted in §3.24); *Tan v Goddard* (1993) 13 CA4th 1528, 1535, 17 CR2d 89 (student jockey "may be held to notice that which is obvious and to ask appropriate questions"); *Davis v Gaschler* (1992) 11 CA4th 1392, 1401, 14 CR2d 679 (plaintiff voluntarily assisting in care of injured dog found in street).

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§3.29 C. Assumption of Risk That Bars Recovery

Under the 1992 California Supreme Court reanalysis of the assumption of risk defense, a defendant whose animal caused injury may obtain a complete (not a comparative) defense by showing (1) an implied *primary* assumption of risk (*i.e.,* that the situation is one in which the court should, as a matter of policy, rule that the defendant owed no duty to protect the plaintiff from the kind of injury sustained; see §1.46) or (2) a valid *express* assumption of risk, usually embodied in a written exculpatory agreement or "release from liability" signed by the plaintiff before beginning the activity during which the injury occurred (see §3.32). See *Rosenbloom v Hanour Corp.* (1998) 66 CA4th 1477, 78 CR2d 686 (by analogy to veterinarian's rule (see §3.30), shark owner had complete defense to "dangerous animal" cause of action (see §3.3) against employee of company that built shark tanks who was bitten while attempting to move shark to new tank).

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§3.30 1. Injury Caused by Dog; Veterinarian's Rule

Primary assumption of risk has been applied as a complete defense in an action by a kennel worker bitten while exercising a boarded dog, or a veterinarian injured while professionally examining or treating an animal. *Priebe v Nelson* (2006) 39 C4th 1112, 47 CR3d 553. The animal's owner is deemed, as a matter of legal policy, to owe no duty of care to the veterinarian or kennel worker unless the owner has engaged in intentional concealment or misrepresentation of the animal's propensities or, perhaps, unless the owner's conduct has been so reckless as to fall totally outside the range of behavior ordinarily expected of those who use veterinary and boarding kennel services. See *Cohen v McIntyre* (1993) 16 CA4th 650, 655, 20 CR2d 143 (dog bit veterinarian who had removed its muzzle; owner had not disclosed that dog had bitten three people in previous 2 years). See also *Farnam v State* (2000) 84 CA4th 1448, 101 CR2d 642 (firefighter's rule immunized state when CHP officer's dog bit city police officer); *Davis v Gaschler* (1992) 11 CA4th 1392, 1401, 14 CR2d 679 (essential element of primary assumption of risk under veterinarian's rule, as under firefighter's rule (see §1.55), is that plaintiff be employed in and compensated for work that carries with it the very hazards that result in injury; hence, complete defense not applicable to person bitten while voluntarily assisting in care of injured dog found in public place).

Cases decided before the 1992 reanalysis of assumption of risk include the following:

- *Prays v Perryman* (1989) 213 CA3d 1133, 1137, 262 CR 180 (complete defense rejected; pet groomer had not yet decided whether to groom dog still under owner's control; when "defendant brought a growling dog into her shop, plaintiff was not required, to avoid assuming the risk of bloodshed, either to summarily eject the customer or to take flight");
- *Nelson v Hall* (1985) 165 CA3d 709, 714, 211 CR 668 (absolute defense applied to veterinarian's assistant, who was bitten by defendant's dog while plaintiff was assisting in treatment; "risk of dog bites during treatment is a specific known hazard endemic to the very occupation in which plaintiff voluntarily engaged");
- *Willenberg v Superior Court* (1986) 185 CA3d 185, 187, 229 CR 625 (dog got away from owner in office and jumped on veterinarian, causing shoulder injury; complete defense applied even though dog not undergoing treatment at time of injury; "visit to the veterinarian's office can bring about unpredictable behavior in a normally docile animal, and this is an inherent risk which every veterinarian assumes").

See Anno, 4 ALR4th 349 (1981) (dog owner's liability to bitten veterinarian).

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2. Injury Caused by Horse

§3.31 a. Primary Assumption of Risk

Primary assumption of risk provides a complete defense to injury caused by risks inherent in engaging in the sport of horseback riding; the duties owed by commercial operators of horseback riding facilities (see §§3.20-3.23) do not include a duty to provide "ideal" riding horses that "never buck, bite, break into a trot, stumble or 'spook' when confronted by a frightening event on the trail." *Harrold v Rolling J Ranch* (1993) 19 CA4th 578, 588, 23 CR2d 671 (plaintiff bucked off when horse spooked as plaintiff was taking off her jacket). See *Levinson v Owens* (2009) 176 CA4th 1534, 98 CR3d 779 (no showing that host who let guest ride horse increased risk inherent in horse behaving as horse). But see *Giardino v Brown* (2002) 98 CA4th 820, 834, 120 CR2d 77 (novice horseback rider at Girl Scout camp did not assume risk of injury when supplied with inappropriately spirited horse; see §3.20).

Absence of duty, rather than primary assumption of risk, bars a rider who was thrown from a horse from pursuing a personal injury damages claim against the owners of a garbage truck the ordinarily noisy operation of which on property adjacent to a park allegedly frightened the horse into bucking. *Parsons v Crown Disposal Co.* (1997) 15 C4th 456, 63 CR2d 291 (fact that truck operation would increase the risks to nearby equestrians did not establish a duty). See generally §§1.6, 1.46.

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§3.32 b. Express Assumption of Risk: Exculpatory Agreements (Releases)

A general release signed by a knowledgeable riding stable patron may bar recovery; CC §1668, which declares that certain contracts are unlawful, does not preclude exemptions for ordinary negligence if no public interest is involved. *Guido v Koopman* (1991) 1 CA4th 837, 841, 2 CR2d 437 (recreational activities such as horseback riding are not within "public interest" category; plaintiff, an attorney, knew that being thrown from horse was inherent risk of riding and should not have been misled by owner's statement that release was "meaningless").

A printed blanket exculpatory (release) form that was not brought to the rider's attention is ineffective. *Palmquist v Mercer* (1954) 43 C2d 92, 98, 272 P2d 26. Also ineffective is a release that does not "clearly and unambiguously inform an ordinary person untrained in the law that its purpose and effect is to exempt [the stablekeeper] from liability for its own negligence." *Cohen v Five Brooks Stable* (2008) 159 CA4th 1476, 1480, 72 CR3d 471 (fact question whether trail ride leader's suddenly putting his horse into gallop increased risk to other riders beyond that inherent in horseback riding).

For more on exculpatory agreements, releases, and express assumption of risk, see §1.54.

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§3.33 D. Willfully Invited Injury

It has been held that a plaintiff who willfully invited injury by kicking, teasing, or otherwise provoking the animal is barred from recovering damages. See *Smythe v Schacht* (1949) 93 CA2d 315, 321, 209 P2d 114. See Anno, 11 ALR5th 127 (1993) (intentional provocation, etc., as defense to action for injury by dog). Under the comparative fault system (see §1.41), however, such willful misconduct by the injured person would not appear to bar recovery, but would, when compared with the defendant's fault, proportionally reduce the plaintiff's damages. See discussion in §1.45.

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§3.34 E. Public Entity Immunities

A public entity on the premises of which a plaintiff is injured by an animal may be able to avoid liability by invoking a statutory immunity. See, *e.g., State v Superior Court (Young)* (1995) 32 CA4th 325, 39 CR2d 1 (state not liable for injury to horseback rider on park trail injured when horse frightened by careering mountain bike rider). On public entity liability and immunities, see chap 8.

Government Code 820.2 provides no immunity for discretionary acts outside a public employee's authority. *Jamgotchian v Slender* (2009) 170 CA4th 1384, 1399, 89 CR3d 122 (racing steward had no regulatory authority to require horse to be raced and could be liable for injury to horse by requiring it to be raced against owner's wish).

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§3.35 F. Medical Injury Compensation Reform Act (MICRA)

Restrictions on the liability of medical care providers enacted by the Medical Injury Compensation Reform Act of 1975 (MICRA), and found in a variety of code sections, including procedural restrictions on claims for punitive damages in CCP §425.13 (see §9.29) and limitations provisions in CCP §340.5 (see §§9.27, 9.71-9.76), protect veterinarians sued for professional negligence. 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 MICRA definition of professional negligence; restrictions not applicable). On other MICRA provisions, see §§9.85-9.89.

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Source: Torts/California Tort Guide/4 Automobiles/Chapter Outline

4

Automobiles

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1. General Principles §4.77
2. Rider's Consent to Driver's Conduct §4.78
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D. Felons; Uninsured and Drunk Drivers §4.81

IV. POLICE PURSUITS: IMMUNITY; CIVIL RIGHTS §4.82

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§4.1 I. SCOPE OF CHAPTER

This chapter's discussion of "automobiles" applies to motor vehicles generally, including motorcycles and trucks, and may apply to such other vehicles as bicycles and golf carts when operated on streets and highways. See generally Wyle, *Special Considerations in Motorcycle Accidents,* 35 CAOC Forum No. 9, p 25 (Consumer Attorneys of California), Nov. 2005.

Other chapters cover the liability of such persons as: vehicle manufacturers, distributors, retailers, and other suppliers for defects in the vehicle (see chap 11); governmental entities for the design, maintenance, or condition of the roadway (§§8.18-8.25, 8.31); street vendors whose "business premises" (the place from which they sell a product or service) is a motor vehicle (see §10.42); and the carriers of persons and freight (see chap 5).

For coverage of vehicle insurance disputes, see California Automobile Insurance Law Guide (2d ed Cal CEB 2005).

See generally Anno, 15 ALR6th 1 (2006) (evidence of prior accidents or injuries at same place).

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II. PERSONS LIABLE; DUTIES

A. Drivers

§4.2 1. Duty to Use Ordinary Care: Standard for Adults, Minors, and Impaired Persons

The general test of ordinary care and skill applies to a vehicle operator unless a statute specifies a standard of conduct. See CC §1714(a); *Watkins v Ohman* (1967) 251 CA2d 501, 502, 59 CR 709, 710 (driver required to act as reasonably prudent person would in similar circumstances); *Westcott v Hamilton* (1962) 202 CA2d 261, 271, 20 CR 677, 683; *Enos v Norton* (1930) 109 CA 19, 24, 292 P 276, 278. For a general discussion of the elements of liability for negligence, see §§1.4-1.40.

A minor driver is held to the same standard of ordinary care and skill as an adult, because he or she is engaged in an adult activity. *Prichard v Veterans Cab Co.* (1965) 63 C2d 727, 731, 47 CR 904, 907 (motorcycle); *Schauf v Southern Cal. Edison Co.* (1966) 243 CA2d 450, 457, 52 CR 518, 522 (automobile); *Neudeck v Bransten* (1965) 233 CA2d 17, 21, 43 CR 250, 253 (same).

Similarly, a mentally or physically impaired person who is licensed to drive a vehicle may be liable for failure to use the care and skill of an unimpaired adult. See *Fox v City & County of San Francisco* (1975) 47 CA3d 164, 173, 120 CR 779 (bicycle messenger with IQ between 52 and 70). See Restatement (Second) of Torts §§283B (mental deficiency), 464 comment g (contributory negligence standard) (1965). But see Restatement §283C (physical disability).

A driver whose car does not come in physical contact with the plaintiff's car may still be liable. *Tischoff v Wolfchief* (1971) 16 CA3d 703, 706, 94 CR 299 (defendant was street racing with car that struck plaintiff's car).

See Anno, 21 ALR5th 82 (1994) (jury instructions on "unavoidable accident," "mere accident," etc.).

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§4.3 a. Vigilance, Control, and Lookout

Embraced within ordinary care is the driver's duty to be reasonably vigilant and in reasonable control of the vehicle. *Lutz v Schendel* (1959) 175 CA2d 140, 143, 345 P2d 488, 491 (rear-ended car ahead); *Norman v Tully* (1957) 149 CA2d 530, 533, 308 P2d 875, 877 (failed to control truck's speed on downgrade); *Reich v Long* (1950) 97 CA2d 657, 660, 218 P2d 589, 591 (car broadsided when making left turn). See also *Scott v Mackey* (1958) 159 CA2d 690, 696, 324 P2d 703, 707.

A driver is expected to see the things an ordinarily prudent person would see. *Leeper v Nelson* (1956) 139 CA2d 65, 68, 293 P2d 111, 113 (car stopped in intersection); *Orbach v Zern* (1955) 138 CA2d 178, 181, 291 P2d 120, 123 (pedestrian on highway); *Rednall v Thompson* (1952) 108 CA2d 662, 667, 239 P2d 693, 696 (car stopped on highway); *Huetter v Andrews* (1949) 91 CA2d 142, 146, 204 P2d 655, 658 (car crossing highway).

The test of ordinary care is met, however, by an operator who maintains a reasonable lookout for foreseeable events and conditions. *Freeman v Churchill* (1947) 30 C2d 453, 459, 183 P2d 4, 7 (truck in intersection); *Wilson v Foley* (1957) 149 CA2d 726, 734, 309 P2d 97, 102 (car stopped on highway); *Prato v Snyder* (1936) 12 CA2d 88, 95, 55 P2d 255, 259 (motorcyclist lying on highway).

See Anno, 36 ALR6th 443 (2008) (civil liability arising from use of cell phone while driving).

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Source: Torts/California Tort Guide/4 Automobiles/§4.4 (1) Limited Visibility; Range of Vision

§4.4 (1) Limited Visibility; Range of Vision

The driver whose vision is obscured or limited must use care commensurate with the increased danger from the condition. *Johnson v Duvall* (1963) 215 CA2d 122, 126, 30 CR 106, 109 (fog); *Pacific Greyhound Lines v Querner* (1960) 187 CA2d 190, 193, 9 CR 370, 371 (same); *Taylor v Gear* (1952) 108 CA2d 517, 520, 239 P2d 11, 13 (glare of oncoming headlights); *Robinson v Kelly* (1949) 95 CA2d 320, 327, 212 P2d 921, 925 (truck headlights). See Annos, 32 ALR4th 933 (1984) (driver's vision obscured by smoke or steam), 63 ALR3d 824 (1975) (driver blinded by other vehicle's lights), 42 ALR2d 13, 33 (1955) (smoke, dust, atmospheric condition, or unclean windshield).

Liability may be imposed on a driver who is going too fast to stop within the range of his vision. *Maxwell v Colburn* (1980) 105 CA3d 180, 186, 163 CR 912 (dark night); *Smith v Pacific Greyhound Corp.* (1934) 139 CA 696, 701, 35 P2d 169, 171 (25 mph in rain and darkness); *Smith v Fall River Joint Union High Sch. Dist.* (1931) 118 CA 673, 676, 5 P2d 930, 931 (school bus in smoke). This conduct is not necessarily negligent, however; the question is one of fact. *Peri v Los Angeles Junction Ry.* (1943) 22 C2d 111, 127, 137 P2d 441, 446 (train traveling 4-6 mph in heavy fog); *Teilhet v Santa Clara* (1957) 149 CA2d 305, 310, 308 P2d 356, 360 (10 mph in heavy smoke); *Casey v Gritsch* (1934) 1 CA2d 206, 213, 36 P2d 696, 699 (45 mph in darkness).

On the duty to sound the horn when approaching a blind curve or hill, see Veh C §21662; *Casey v Russell* (1982) 138 CA3d 379, 383, 188 CR 18. See Anno, 16 ALR3d 897 (1967).

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§4.5 (2) Inference of Negligence From Loss of Control (Res Ipsa Loquitur)

Driver negligence may be inferred under res ipsa loquitur (see §1.35) when the vehicle overturns or leaves the road for no apparent reason or adequate cause. *Scott v Burke* (1952) 39 C2d 388, 394, 247 P2d 313, 316 (car went off road on clear, dry day); *Druzanich v Criley* (1942) 19 C2d 439, 444, 122 P2d 53, 56 (car flipped over embankment); *Tannyhill v Pacific Motor Transp. Co.* (1964) 227 CA2d 512, 520, 38 CR 774, 779 (truck jackknifed and left highway); *Fedler v Hygelund* (1951) 106 CA2d 480, 486, 235 P2d 247, 250 (truck going downhill turned over); *Ford v Carew & English* (1948) 89 CA2d 199, 205, 200 P2d 828, 830 (car veered and hit light standard); *Ellis v Jewett* (1937) 18 CA2d 629, 636, 64 P2d 432, 435 (car left rain-slicked highway and turned over), disapproved on other grounds at 39 C2d 401. See Anno, 79 ALR2d 6, 22 (1961) (applicability of res ipsa loquitur if motor vehicle leaves road).

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Source: Torts/California Tort Guide/4 Automobiles/§4.6 b. Right to Assume Due Care by Others

§4.6 b. Right to Assume Due Care by Others

A driver who exercises due care is entitled to assume that others will obey the law and use ordinary care. *Rodabaugh v Tekus* (1952) 39 C2d 290, 294, 246 P2d 663, 665 (assumed that other driver would heed stop sign); *Pewitt v Riley* (1945) 27 C2d 310, 317, 163 P2d 873, 877 (assumed that other driver would not cross highway without signaling); *Simmons v Wexler* (1979) 94 CA3d 1007, 1013, 156 CR 810 (assumed that slowing vehicle would heed stop sign); *Kavner v Holzmark* (1960) 185 CA2d 138, 145, 8 CR 145, 149 (assumed that pedestrian would not walk in front of bus). The assumption that another would use due care does not aid a driver

- who himself did not use due care (*Porter v Bakersfield & Kern Elec. Ry.* (1950) 36 C2d 582, 585, 225 P2d 223, 225 (bus driver traveling at excessive speed could not rely on assumption that children would not be directed into his path));
- who had notice or knowledge that the other person was not obeying the law or using care (*Stickel v San Diego Elec. Ry.* (1948) 32 C2d 157, 167, 195 P2d 416, 422 (bus driver should have seen that car was running stop sign); *Koenig v Coe* (1958) 163 CA2d 429, 432, 329 P2d 721, 725 (speed of oncoming car should have indicated that it was going to run stop sign); but see *Stephens v Hatfield* (1963) 214 CA2d 140, 142, 29 CR 436, 439 (no evidence of notice, thus driver could rely on assumption)); or
- in situations involving children or other persons known to be irresponsible (*Garibaldi v Borchers Bros.* (1957) 48 C2d 283, 292, 309 P2d 23, 28 (child stepped from curb in front of truck)).

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Source: Torts/California Tort Guide/4 Automobiles/§4.7 c. Sudden Emergency; Imminent Peril

§4.7 c. Sudden Emergency; Imminent Peril

A person faced with a sudden emergency is not required to use the same judgment and prudence in choosing a course of action that would be required in the exercise of ordinary care in a nonemergency situation. *Leo v Dunham* (1953) 41 C2d 712, 714, 264 P2d 1, 2 (truck driver suddenly realized pedestrian was in his path); *Steuer v Phelps* (1974) 41 CA3d 468, 473, 116 CR 61 (driver swerved into right lane to avoid head-on collision); *Schultz v Mathias* (1970) 3 CA3d 904, 912, 83 CR 888 (driver veered left instead of right to avoid car approaching on wrong side of road), disapproved on other grounds at 3 C3d 364 n1; *Phillips v Treiman* (1967) 249 CA2d 33, 37, 57 CR 37, 41 (pedestrian tried to run across street rather than return when light changed); *Gamalia v Badillo* (1942) 53 CA2d 375, 378, 128 P2d 184, 186 (driver tried to hold car in center of road after axle broke); *Enos v Norton* (1930) 109 CA 19, 23, 292 P 276, 278 (motorcyclist braked but did not turn when car turned into his path). See Anno, 75 ALR3d 327 (1977) (sudden emergency as excuse for inability to stop).

For this emergency (or imminent peril) doctrine to apply, the person must

- be free from negligence contributing to the emergency (see *Philo v Lancia* (1967) 256 CA2d 475, 482, 63 CR 900, 904), and
- act as a reasonably prudent person would in a similar emergency (*Mortensen v Fairbanks* (1934) 1 C2d 489, 492, 35 P2d 1030, 1031 (accelerated to avoid accident); *Van Fleet v Heyler* (1942) 51 CA2d 719, 732, 125 P2d 586, 593 (drove into ditch to avoid mule train)).

It is error to instruct on the emergency doctrine unless at least two possible courses of action were open to the party after the danger was perceived. *Casey v Russell* (1982) 138 CA3d 379, 386, 188 CR 18 (head-on collision on curve; neither driver saw other vehicle in time); *Staggs v Atchison, T. & S.F. Ry.* (1955) 135 CA2d 492, 502, 287 P2d 817, 823 (train crew saw infant on tracks too late); *Perry v Piombo* (1946) 73 CA2d 569, 572, 166 P2d 888, 890 (boy walked into side of truck before seeing it or being seen by driver). But see *McShane v Cleaver* (1966) 247 CA2d 260, 268, 55 CR 427, 432 (tire failed; driver tried to steer to right but did not brake); *Grinstead v Krushkhov* (1964) 228 CA2d 793, 796, 39 CR 812, 814 (driver could have swerved left instead of right to avoid collision). See also *Smith v Johe* (1957) 154 CA2d 508, 511, 316 P2d 688, 690 (jury could have found that pedestrian had a choice).

An emergency may arise from the following:

- An unexpected or sudden occurrence (see *Fraser v Stellinger* (1942) 52 CA2d 564, 567, 126 P2d 653, 654 (emergency instruction properly denied when driver saw bicyclist 1000 feet before accident); or
- A sudden realization by a nonnegligent person of the danger from preceding events (*Leo v Dunham* (1953) 41 C2d 712, 715, 264 P2d 1, 3 (driver suddenly realized that pedestrian would cross in front of his truck); *Persike v Gray* (1963) 215 CA2d 816, 822, 30 CR 603, 606 (ill passenger fell against car door)).

It is usually a question of fact whether the person who asks for the imminent peril instruction either (1) was suddenly and unexpectedly confronted with an actual or apparent peril, or (2) by his own inattention put himself in a position that led him to act without deliberation in trying to avoid a collision. See *Leo v Dunham, supra*; *Castro v E.A. Irish, Contractor* (1967) 249 CA2d 390, 393, 57 CR 477, 479 (approaching car turned left in front of driver); *Pittman v Boiven* (1967) 249 CA2d 207, 216, 57 CR 319, 325 (preceding car stopped); *McShane v Cleaver, supra*.

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Source: Torts/California Tort Guide/4 Automobiles/§4.8 d. Sudden Illness or Disability

§4.8 d. Sudden Illness or Disability

Negligence, not strict liability, principles govern the liability of a driver who loses control of a vehicle on suddenly and unforeseeably losing consciousness or function. *Hammontree v Jenner* (1971) 20 CA3d 528, 531, 97 CR 739. Such a driver may be found free from negligence. See *Tannyhill v Pacific Motor Transp. Co.* (1964) 227 CA2d 512, 521, 38 CR 774, 779 (heart attack); *Ford v Carew & English* (1948) 89 CA2d 199, 203, 200 P2d 828, 830 (driver blacked out, possible heart attack). See also *Zabunoff v Walker* (1961) 192 CA2d 8, 11, 13 CR 463, 465 (sneeze). See Anno, 28 ALR2d 12, 35 (1953) (physical defect, illness, drowsiness, or falling asleep).

A driver who claims sudden illness or disablement has the burden of proving

- the reason for the disability or loss of consciousness,
- that the disabling condition preceded the accident and caused the loss of control, and
- that he had no reason to anticipate the attack or condition.

See *Tannyhill v Pacific Motor Transp. Co., supra*; *Ford v Carew & English, supra*; *Waters v Pacific Coast Dairy, Inc.* (1942) 55 CA2d 789, 793, 131 P2d 588, 590 (pain in shoulder, unconsciousness).

A person who operates a motor vehicle with knowledge of a disabling physical infirmity may be negligent for that reason alone. See *Snider v Whitson* (1960) 184 CA2d 211, 215, 7 CR 353, 356 (willful misconduct). See also Health & S C §103900 (medical reports to Department of Motor Vehicles on disorders characterized by loss of consciousness). See Anno, 28 ALR2d 12, 40 (1953).

Falling asleep at the wheel is not a disabling event that excuses a loss of control (*Bailin v Phoenix* (1929) 102 CA 117, 118, 282 P 421), especially if the driver should have been aware of that possibility (see *Druzanich v Criley* (1942) 19 C2d 439, 445, 122 P2d 53, 56). See Anno, 28 ALR2d 12, 44 (1953).

The sudden, unanticipated onset of a mental disorder does not obviate liability. *Bashi v Wodarz* (1996) 45 CA4th 1314, 1323, 53 CR2d 635. See CC §41 (persons of unsound mind, of whatever degree, civilly liable for their wrongs).

See Veh C §21702 and 13 Cal Code Regs §1212 for statutes and regulations limiting certain drivers' hours.

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§4.9 e. Private Roads or Premises

The ordinary care standard applies to driving on a private road or premises. *Turnipseed v Hoffman* (1944) 23 C2d 532, 534, 144 P2d 797, 798 (private driveway behind dairy); *Taylor v Oakland Scavenger Co.* (1941) 17 C2d 594, 599, 110 P2d 1044, 1047 (school grounds; extra caution needed to meet standard); *Finney v Neuman* (1960) 186 CA2d 463, 468, 9 CR 331, 334 (market parking lot); *Henslee v Fox* (1938) 25 CA2d 286, 291, 77 P2d 307, 310 (street on railroad company property).

Traffic laws do not apply in these areas, but failure to conform to established custom embodied in the regulations is evidence of negligence. *Sills v Forbes* (1939) 33 CA2d 219, 228, 91 P2d 246, 251 (private road).

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2. Duties Based on Statutes

§4.10 a. Rules of the Road; Presumption of Negligence

The Rules of the Road (Veh C §§21000-23336) and other statutes that impose requirements on drivers, establish statutory standards of due care. See *Satterlee v Orange Glenn Sch. Dist.* (1947) 29 C2d 581, 587, 177 P2d 279, 283, disapproved on other grounds at 50 C2d 624.

Under Evid C §669(a), proof that a driver violated such a statute may give rise to a presumption that the driver was negligent. See, *e.g., La Manna v Stewart* (1975) 13 C3d 413, 425, 118 CR 761, 769 (failure to yield right-of-way to pedestrian in crosswalk); *Brooks v E.J. Willig Truck Transp. Co.* (1953) 40 C2d 669, 679, 255 P2d 802, 808 (failure to stop and render aid at accident); *Casey v Russell* (1982) 138 CA3d 379, 383, 188 CR 18 (failure to sound horn approaching blind curve on narrow road; *Tischoff v Wolfchief* (1971) 16 CA3d 703, 707, 94 CR 299, 301 (speed contest). For discussion of the criteria for applying Evid C §669(a), see §§1.31-1.34. See also §§4.25 (driving under the influence), 4.63 (liability for furnishing alcohol). But see *Shmatovich v New Sonoma Creamery* (1960) 187 CA2d 342, 344, 9 CR 630, 632, disapproved on other grounds at 63 C2d 732 (presumption does not apply to lack of driver's license).

An actual violation of a "rules of the road" statute must be shown before the Evid C §669 presumption becomes applicable. See *Parsons v Crown Disposal Co.* (1997) 15 C4th 456, 484, 63 CR2d 291 (Veh C §21759's requirement that driver approaching ridden horse "stop as necessary" to avoid frightening it did not apply to stationary garbage truck lifting bin in ordinarily noisy manner on property adjacent to park).

A judge can find a person negligent as a matter of law if reasonable men could conclude from the evidence only that the person

- violated a traffic regulation (or it is admitted or undisputed that he did), and
- did not do what might reasonably be expected of a person of ordinary prudence who wished to comply with the law (*i.e.,* failed to offer an adequate explanation). See *Schmitt v Henderson* (1969) 1 C3d 460, 463, 82 CR 502; *Dutcher v Weber* (1969) 275 CA2d 961, 963, 80 CR 378. See also Official Comment to Evid C §669 on functions of judge and jury.

Of course, even a person found to be negligent as a matter of law can show that the negligence was not a legal (proximate) cause of the injury (see §§1.14-1.18), or that the comparative fault defense applies (see §§1.41-1.45).

The presumption of negligence may be rebutted by proof that the person violating the statute did what might reasonably be expected of someone of ordinary prudence, acting in similar circumstances, who wished to comply with the law. See §1.34. See also *Alarid v Vanier* (1958) 50 C2d 617, 624, 327 P2d 897, 900 (brakes failed; but see §4.39); *Schultz v Mathias* (1970) 3 CA3d 904, 913, 83 CR 888 (emergency may excuse violation), disapproved on other grounds at 3 C3d 364 n1. Absent evidence of circumstances that prevented compliance or justified noncompliance, however, it is not an excuse that others of ordinary prudence customarily violated the statute. *Casey v Russell* (1982) 138 CA3d 379, 385, 188 CR 18.

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§4.11 b. Persons Subject to Traffic Laws

The Vehicle Code, including the Rules of the Road (see §4.10), applies generally to everyone driving vehicles on the highways, except that some exemptions are made for public employees working on a highway (see §4.12), authorized emergency vehicles (see §4.13), physicians, and rubbish vehicles (Veh C §§21052-21059).

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Source: Torts/California Tort Guide/4 Automobiles/§4.12 (1) Highway Workers

§4.12 (1) Highway Workers

Public employees, and publicly owned motor vehicles and other equipment, actually at work on the surface of the highway or on traffic control devices are not subject to certain Vehicle Code traffic regulations. Veh C §§21053-21054. However, the statutory regulations do govern travel to or from this work and travel outside the work area. *Gonsalves v Petaluma Bldg. Materials Co.* (1960) 181 CA2d 320, 327, 5 CR 332, 336 (water truck crossing highway to construction work on center divider).

The exemption from compliance with the Vehicle Code does not preclude public employee liability for ordinary negligence. *Yarrow v State* (1960) 53 C2d 427, 441, 2 CR 137, 145 (failure to adequately warn of construction work); *Hand v City of Los Angeles* (1961) 196 CA2d 246, 252, 16 CR 335, 338 (negligent operation of road grader near children).

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Source: Torts/California Tort Guide/4 Automobiles/§4.13 (2) Emergency Vehicle Drivers

§4.13 (2) Emergency Vehicle Drivers

The driver of an authorized emergency vehicle (defined in Veh C §165) is exempt from most traffic regulations while the vehicle is being driven in rescue operations, or in response to an emergency call or in pursuit of a suspected violator, if the vehicle displays a red warning light, and the driver sounds a siren as reasonably necessary. Veh C §21055. See *Grant v Petronella* (1975) 50 CA3d 281, 286, 123 CR 399 (traffic regulations applied to sheriff on emergency call but not using light and siren). See also Veh C §21058 (vehicles owned by physicians); 13 Cal Code Regs §§1100-1109 (ambulances). See §4.82 on immunity from liability for death or injury to, or caused by, a driver being pursued by police.

Under Veh C §21056, a driver who is answering an emergency call and is using the required red light and siren must still drive with due regard for the safety of other highway users, and may be liable for an arbitrary exercise of §21055 privileges. Violation of a traffic regulation by a driver complying with §§21055 and 21056 does not give rise to a presumption of negligence (see §4.10), although the driver must do what a reasonable, prudent emergency driver would do under the circumstances, including the nature of the emergency. *Dillenbeck v City of Los Angeles* (1968) 69 C2d 472, 476, 72 CR 321, 324; *Torres v City of Los Angeles* (1962) 58 C2d 35, 51, 22 CR 866, 874 (two fire engines collided after one went through red light). See *West v City of San Diego* (1960) 54 C2d 469, 474, 6 CR 289, overruled on other grounds at 12 C3d 408 (excessive speed).

Conversely, if the emergency vehicle driver is not using the required red light and siren, violation of a traffic rule gives rise to a presumption of negligence, and the fact that the driver was responding to an emergency may not be used to rebut the presumption. *Monroy v City of Los Angeles* (2008) 164 CA4th 248, 78 CR3d 738 (answers to pretrial requests for admission made it reversible error to instruct jury that police officers driving to assist another officer were exempt from speeding and right-of-way rules under Veh C §21055); *City of Sacramento v Superior Court* (1982) 131 CA3d 395, 403, 182 CR 443 (fact question whether red lights and siren activated and, if so, at what point); *Grant v Petronella* (1975) 50 CA3d 281, 289, 123 CR 399 (failure to use red light and siren would support conclusion driver was not person who desired to comply with law). See *Witt v Jackson* (1961) 57 C2d 57, 65, 17 CR 369, 372 (evidence that police car driver failed to use red light soon enough to avert collision).

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c. Particular Traffic Rules

§4.14 (1) Right Side of Road

Evidence that a vehicle was on the wrong side of the road when a collision occurred, in violation of a traffic regulation (see Veh C §§21650, 21660, 21751-21752), gives rise to a presumption of negligence (see §4.10). *Casey v Russell* (1982) 138 CA3d 379, 385, 188 CR 18 (driving in middle of narrow road around blind curve); *Salvetti v Byrd* (1963) 222 CA2d 418, 421, 35 CR 185, 187 (car skidded to wrong side); *Scott v Mackey* (1958) 159 CA2d 690, 697, 324 P2d 703, 708; *Engelman v Consolidated House Movers, Inc.* (1955) 135 CA2d 237, 242, 286 P2d 988, 990 (house being moved was on wrong side); *Green v Uarte* (1948) 87 CA2d 75, 78, 196 P2d 63, 65. See generally §4.10. See also *Beaird v Bryan* (1966) 244 CA2d 836, 841, 53 CR 428, 432.

This presumption does not compel a verdict against the wrong-side driver if there is a factual issue of excuse or causation. *Tobler v Chapman* (1973) 31 CA3d 568, 588, 107 CR 614, 628 (defendant's car was bumped and pushed to wrong side); *Shoemaker v State* (1962) 202 CA2d 379, 384, 20 CR 812, 815 (driver's position on highway not a cause of accident); *Valdez v Clark* (1959) 173 CA2d 476, 478, 343 P2d 281, 283 (fact that driver was on wrong side not a proximate cause of child pedestrian's injuries). See *Casey v Russell, supra* (driver tried to avoid soft sand and drop-off on his right); *Schultz v Mathias* (1970) 3 CA3d 904, 83 CR 888 (driver swerved to wrong side to avoid collision), disapproved on other grounds at 3 C3d 364 n1.

A head-on collision on the plaintiff's side of the road may also give rise to the res ipsa loquitur presumption (see §1.35), even if a driver other than the defendant was concurrently negligent. *Tobler v Chapman* (1973) 31 CA3d 568, 584, 107 CR 614. But see *Faulk v Soberanes* (1961) 56 C2d 466, 470, 14 CR 545, 547 (unconditional res ipsa loquitur instruction properly refused when third person may have been negligent).

See Anno, 22 ALR3d 325 (1968) (duty to give audible signal before passing).

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§4.15 (2) Right-of-Way Rules

Various right-of-way regulations pertain to uncontrolled intersections (Veh C §21800), left turns (Veh C §21801), through roads (Veh C §21802), yield intersections (Veh C §21803), entrances from premises and alleys (Veh C §21804), the approach of emergency vehicles (Veh C §21806), pedestrian crossings (Veh C §§21950-21954), and turns at intersections controlled by signals (Veh C §§21451-21454).

Violating a right-of-way provision gives rise to a presumption of negligence (see §4.10). *Satterlee v Orange Glenn Sch. Dist.* (1947) 29 C2d 581, 587, 592, 177 P2d 279, 283, 284 (failure to yield to vehicle entering intersection from right), disapproved on other grounds at 50 C2d 624; *Hardison v Bushnell* (1993) 18 CA4th 22, 29, 22 CR2d 106 (left turn in front of oncoming vehicle).

On the other hand, liability is rarely determined as a matter of law according to who had the right-of-way. *Laymon v Simpson* (1964) 225 CA2d 50, 54, 36 CR 859, 861. The favored driver cannot arbitrarily rely on the right of way. *Satterlee v Orange Glenn Sch. Dist.* (1947) 29 C2d 581, 591, 177 P2d 279, 284 (other driver's violation may be excused); *Malone v Perryman* (1964) 226 CA2d 227, 234, 37 CR 864, 868 (driver must use due care despite having right of way). But see *Hardison v Bushnell, supra* (passenger in oncoming vehicle entitled to verdict as matter of law against turning driver).

When a vehicle proceeding through an intersection is struck by a vehicle that is making a left turn, no duty was owed to the injured driver by a third driver who, yielding his own right-of-way, signaled the turning driver to proceed. *Gilmer v Ellington* (2008) 159 CA4th 190, 70 CR3d 893 (making safe turn was turning driver's duty; antigridlock law in Veh C §22526 not applicable to safe operation of vehicles).

See Annos, 87 ALR5th 1 (2001) (statutes requiring motorists to yield right-of-way to emergency vehicles), 52 ALR5th 155 (1997) (liability when defendant's vehicle was in funeral procession); 84 ALR4th 124 (1991) (failure to proceed in accordance with turn signal), 53 ALR4th 849 (1987) (liability for U-turn collisions), 7 ALR3d 282 (1966) (right turn from lane other than right lane), 39 ALR2d 103 (1955) (failure to signal for left turn between intersections), 39 ALR2d 15, 65 (1955) (failure to signal for left turn at intersection), 38 ALR2d 143 (1954) (failure to give right-turn signal).

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(3) Speed

§4.16 (a) Basic Speed Law

Anyone who drives at a speed greater than is reasonable or prudent under the prevailing weather, visibility, traffic, and road conditions violates the basic speed law (Veh C §22350), and is presumed negligent (see §4.10). See *Ferrula v Santa Fe Bus Lines* (1948) 83 CA2d 416, 418, 189 P2d 294, 296 (disputed speed on "S" turn).

A driver may violate the basic speed law without exceeding the maximum, prima facie, or posted, speed limit. See *Reynolds v Filomeo* (1951) 38 C2d 5, 13, 236 P2d 801, 806 (45 mph in 55 mph zone at night past lighted cafe); *Maxwell v Colburn* (1980) 105 CA3d 180, 186, 163 CR 912 (35 mph in 45 mph zone at night past park); *Wilkins v Sawyer* (1965) 232 CA2d 458, 464, 42 CR 817, 822 (35 mph in 60 mph zone when view of driveway obscured by weeds).

Whether the basic speed law has been violated is a question of fact. *Maxwell v Colburn, supra; Leighton v Dodge* (1965) 236 CA2d 54, 57, 45 CR 820, 821.

The driver of a commercial vehicle must, under 49 CFR §392.14, use "extreme caution" and reduce speed when hazardous conditions, including rain, adversely affect visibility or traction. *Weaver v Chavez* (2005) 133 CA4th 1350, 35 CR3d 514 (error not to instruct on federal regulation as imposing higher standard of care than state's basic speed law).

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§4.17 (b) Maximum Limits

Vehicle Code §22349(a) sets a maximum highway speed limit of 65 miles per hour, although Veh C §22356 permits the setting of 70 mph maximum on designated and posted state highways. Vehicle Code §§22349(b), (c), 22406-22407, 22413, and 35785(b) establish lower maximum speed limits for specified roads and vehicles. Violation of a maximum speed limit gives rise to a presumption of negligence (see §4.10). *Hargrave v Winquist* (1982) 134 CA3d 916, 923, 185 CR 30 (error to instruct on prima facie speed limit); *Fortier Transp. Co. v Union Packing Co.* (1950) 96 CA2d 748, 752, 216 P2d 470, 473 (driving loaded truck and semitrailer faster than 40 mph).

The presumption of negligence that arises from violation of a maximum speed limit can be overcome by evidence of excuse or justification. See *Barth v B.F. Goodrich Tire Co.* (1968) 265 CA2d 228, 247, 71 CR 306, 317.

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Source: Torts/California Tort Guide/4 Automobiles/§4.18 (c) Prima Facie and Posted Limits

§4.18 (c) Prima Facie and Posted Limits

Vehicle Code §§22352, 22354-22355, 22357-22358, 22358.3, and 22360-22363 (see also Veh C §§22402-22405) specify *prima facie* speed limits for particular roads and locales, but permit governmental entities, on the basis of engineering and traffic surveys, to set a prima facie limit lower than an otherwise applicable maximum speed limit, or to raise an otherwise applicable prima facie speed limit, by erecting signs *posting* the lower or higher prima facie limit.

The prima facie speed limit at the place an accident occurred is a fact to be considered by the trier of fact in deciding whether a driver violated the basic speed law. See *Hardin v San Jose City Lines, Inc.* (1953) 41 C2d 432, 439, 260 P2d 63, 67 (bus traveling 30 mph in 25 mph zone); *Roulsten v Pacific Tel. & Tel. Co.* (1979) 96 CA3d 149, 153, 158 CR 43 (prima facie "school" speed limit controls over posted limit at unfenced schoolyard); *Hodges v Severns* (1962) 201 CA2d 99, 111, 20 CR 129, 136 (officer testified that basic limit was 25 mph in zone posted 40 mph).

Proof that a vehicle was traveling faster than the prima facie limit does not, by itself, prove negligence. Veh C §40831. See *Mapes v Yowell* (1960) 54 C2d 231, 233, 5 CR 159, 160 (instruction properly refused); *Westberg v Willde* (1939) 14 C2d 360, 369, 94 P2d 590, 595 (instruction was reversible error); *Miller v Northwestern Pac. R.R.* (1962) 206 CA2d 500, 502, 24 CR 99, 100 (instruction properly refused).

Conversely, evidence that a vehicle's speed was within the prima facie limit does not necessarily establish due care. *Maxwell v Colburn* (1980) 105 CA3d 180, 186, 163 CR 912; *Wilkins v Sawyer* (1965) 232 CA2d 458, 464, 42 CR 817, 822.

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Source: Torts/California Tort Guide/4 Automobiles/§4.19 (d) Racing on Streets

§4.19 (d) Racing on Streets

It is unlawful to engage in a speed contest or exhibition on a highway or to aid or abet such a contest or exhibition. Veh C §23109. The operators of the automobiles involved in a race may be concurring causes of an accident even if only one vehicle collides with the plaintiff. *Tischoff v Wolfchief* (1971) 16 CA3d 703, 706, 94 CR 299; *Sena v Turner* (1961) 195 CA2d 487, 491, 15 CR 857, 859.

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Source: Torts/California Tort Guide/4 Automobiles/§4.20 (e) Minimum Speed Law

§4.20 (e) Minimum Speed Law

Driving at an unreasonably slow speed may constitute negligence. Veh C §22400; *Seaton v Spence* (1963) 215 CA2d 761, 766, 30 CR 510, 513. Driving at the posted maximum speed limit does not subject the driver to liability even if other traffic on the highway (here, an interstate freeway) was exceeding the posted limit and the driver was not in the right (or "slow") lane. *Monreal v Tobin* (1998) 61 CA4th 1337, 72 CR2d 168.

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§4.21 (4) Stopping, Standing, and Parking

Various regulations prohibit stopping or parking in designated places (Veh C §§22500, 22510, 22514), and others specify the required manner of parking (Veh C §§22502-22504, 22509, 22515). Evidence that an injury resulted when a driver parked a vehicle in a prohibited area may give rise to a presumption of negligence (see §4.10), but only if the injury was of a type that the regulation was intended to prevent. See *Victor v Hedges* (1999) 77 CA4th 229, 91 CR2d 466 (prohibition against parking on sidewalk was intended to prevent certain pedestrian accidents, not injury to passenger who had alighted from vehicle and was struck by passing vehicle that had come over the curb onto the sidewalk).

Evidence that a driver stopped or parked a vehicle on a roadway in an unincorporated area (Veh C §22504) gives rise to a presumption of negligence (see §4.10), although the driver may rebut that presumption by showing, *e.g.,* that it was not practicable to drive off the roadway or that the vehicle was disabled. See *Willis v Gordon* (1978) 20 C3d 629, 634, 143 CR 723 (question of fact); *Thomson v Bayless* (1944) 24 C2d 543, 546, 150 P2d 413, 414 (trucker failed to show impracticability of parking off highway); *Smith v Wattenburg* (1955) 133 CA2d 193, 195, 283 P2d 751, 753 (trucker claimed disablement). The same rule should apply under Veh C §22520 (stopping on freeway). Even absent a statutory violation, the manner in which a defendant stopped or parked on or near a roadway may be actionable negligence. *Willis v Gordon, supra*.

The feasibility of stopping off the roadway depends on such factors as the following:

- The available parking places in any direction (*Thomson v Bayless* (1944) 24 C2d 543, 547, 150 P2d 413, 414; *Kline v Barkett* (1945) 68 CA2d 765, 774, 158 P2d 51, 56);
- Whether movement would create an unreasonable hazard to the driver, the vehicle, or other traffic (*Gulley v Warren* (1959) 174 CA2d 470, 482, 345 P2d 17, 25); and
- Whether the vehicle is so disabled that it is not reasonably practicable to move it (*Lane v Jaffe* (1964) 225 CA2d 172, 175, 37 CR 171, 173 (flat tire); see Anno, 15 ALR2d 909 (1951); see also Veh C §§22504(b), 22520(d)).

Signals warning of a disabled vehicle may be required by statute (Veh C §25300) or by ordinary care (*Smith v Wattenburg* (1955) 133 CA2d 193, 198, 283 P2d 751, 754). On use of lights, see Veh C §§24400-24401, 24600, 24802.

See Annos, 61 ALR3d 13 (1975) (absence or insufficiency of lights on parked or standing motor vehicle), 63 ALR3d 824 (1975) (driving or parking without dimming lights), 67 ALR2d 12, 25 (1959) (parking or stopping on highway without using flares).

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§4.22 (5) Following; Rear-End Collisions

Statutes impose duties on both the driver in front and the driver behind. See Veh C §§22109 (stopping or sudden decrease in speed without signal), 21703 (following too closely). Thus, the second driver's negligence in rear-end collisions is ordinarily a question of fact. *McHale v Hall* (1967) 257 CA2d 342, 348, 64 CR 694, 699 (sudden deceleration without signal); *Pittman v Boiven* (1967) 249 CA2d 207, 214, 57 CR 319, 323 (same). See Anno, 29 ALR2d 5 (1953) (sudden or unsignaled stop as negligence).

The following driver's negligence may be found as a matter of law when, for example,

- the following driver gives no excuse (*Beck v Kessler* (1965) 235 CA2d 331, 338, 45 CR 237, 240; *Pacific Greyhound Lines v Querner* (1960) 187 CA2d 190, 194, 9 CR 370, 372); or
- the excuse offered is legally inadequate (see *Maloney v Rath* (1968) 69 C2d 442, 71 CR 897 (brake failure); *Ponce v Black* (1964) 224 CA2d 159, 163, 36 CR 419, 421).

Res ipsa loquitur (see §1.35) applies when, *e.g.,* it is undisputed that the front vehicle was lawfully

- stopped at a stop sign (see *Alarid v Vanier* (1958) 50 C2d 617, 625, 327 P2d 897, 900);
- stopped at a signal (*Beck v Kessler* (1965) 235 CA2d 331, 337, 45 CR 237, 240; *Ponce v Black* (1964) 224 CA2d 159, 162, 36 CR 419, 420); or
- moving (*Pacific Greyhound Lines v Querner* (1960) 187 CA2d 190, 193, 9 CR 370, 372).

A conditional res ipsa loquitur instruction should be given if there is evidence of a possible cause other than following too closely. See *Getas v Hook* (1965) 236 CA2d 705, 715, 46 CR 249, 255 (ice on road); *Larson v Solbakken* (1963) 221 CA2d 410, 427, 34 CR 450, 460 (unsafe lane change). Res ipsa loquitur does not apply if the car ahead was rear ended after being struck head on. *Steuer v Phelps* (1974) 41 CA3d 468, 473, 116 CR 61.

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§4.23 (6) Duties to Pedestrians

Although both a driver and an adult pedestrian must use ordinary care, the driver must use greater care because of his greater capacity for causing injury. *Cucinella v Weston Biscuit Co.* (1954) 42 C2d 71, 80, 265 P2d 513, 519; *Arentz v Blackshere* (1967) 248 CA2d 638, 640, 56 CR 809, 811; *Rubalcaba v Sweeney* (1959) 168 CA2d 1, 5, 335 P2d 157, 159. See Anno, 4 ALR5th 193 (1993) (motorist's liability for signaling pedestrian to proceed).

A driver's violation of a pedestrian's right-of-way (Veh C §§21950(a), 21951-21952) gives rise to a presumption of negligence (see §4.10), and an undisputed violation for which the driver gives no adequate explanation is negligence as a matter of law. See, *e.g., La Manna v Stewart* (1975) 13 C3d 413, 427, 118 CR 761 (driver's watching other car approaching intersection not adequate excuse); *Schmitt v Henderson* (1969) 1 C3d 460, 463, 82 CR 502 (unexplained left turn into crosswalk); *Gray v Brinkerhoff* (1953) 41 C2d 180, 184, 258 P2d 834, 836 (attention diverted by another car); *Haynes v Hunt* (1962) 208 CA2d 331, 336, 25 CR 174, 177 (looking at nightclub marquees). But see *Byrne v City & County of San Francisco* (1980) 113 CA3d 731, 737, 170 CR 302 (bus stopped to allow passengers to alight, not to allow pedestrian to cross); *Smith v Sugich Co.* (1960) 179 CA2d 299, 307, 3 CR 718, 723 (pedestrian wore dark clothing and ran across intersection).

A pedestrian's sudden or unexpected movement may negate a driver's violation or may be contributory negligence (see §4.72). See Veh C §21950(b); *Byrne v City & County of San Francisco, supra* (driver's view of crosswalk obstructed by bus); *Parsekyan v Thompson* (1962) 208 CA2d 848, 850, 25 CR 691, 692 (pedestrian who had reached center of street stepped back into path of car).

A pedestrian who crosses outside a crosswalk must yield to vehicles, but this duty does not relieve drivers from the duty to exercise due care for the pedestrian's safety. See Veh C §21954.

A driver who knows or should know that children may be present on a street or private premises must be especially alert and take extra precautions to warn of his approach or intention to move. *Menchaca v Helms Bakeries, Inc.* (1968) 68 C2d 535, 542, 67 CR 775, 779; *Hilyar v Union Ice Co.* (1955) 45 C2d 30, 36, 286 P2d 21, 24; *Casas v Maulhardt Buick, Inc.* (1968) 258 CA2d 692, 697, 66 CR 44, 48 (keep a lookout); *Johnson v Popso* (1961) 194 CA2d 449, 451, 14 CR 834, 839. See §10.42 on duties of street vendors, and *Pekarek v City of San Diego* (1994) 30 CA4th 909, 36 CR2d 22, on governmental liability for street vendors' activities. The standard remains "ordinary care under the circumstances," and one factor is whether the driver should reasonably anticipate the presence of children. *Harris v Union Ice Prods.* (1959) 176 CA2d 132, 136, 1 CR 287, 289.

A physically disabled person using a wheelchair or similar aid is a pedestrian. See Veh C §467. See Annos, 35 ALR4th 1117 (1985) (who has "pedestrian" status), 24 ALR5th 780 (1994) (liability for injury to child on skateboard).

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Source: Torts/California Tort Guide/4 Automobiles/§4.24 (7) Duty to Stop and Render Aid; Hit-and-Run Accidents

§4.24 (7) Duty to Stop and Render Aid; Hit-and-Run Accidents

A driver involved in an injury accident must stop and render aid (Veh C §§20001, 20003) if the driver

- knows of the accident and injury (*Garabedian v Superior Court* (1963) 59 C2d 124, 127, 28 CR 318, 320), or
- is charged with this knowledge under the circumstances (*People v Holford* (1965) 63 C2d 74, 80, 45 CR 167, 170).

The driver must both stop *and* give reasonable assistance. *People v Bellah* (1965) 237 CA2d 122, 125, 46 CR 598, 599; see Veh C §20003 (transportation for medical aid). Excused from these duties is a driver who

- saw others give aid (*People v Scofield* (1928) 203 C 703, 707, 265 P 914, 915); or
- was unable to assist (see *People v Scofield* (1928) 203 C 703, 707, 265 P 914, 916 (dictum); *Moreno v Herrera* (1968) 260 CA2d 418, 426, 67 CR 151, 156 (defendant had to be rescued from submerged car); *McNally v Casner* (1933) 128 CA 680, 686, 18 P2d 94, 96).

See also *Brewer v Teano* (1995) 40 CA4th 1024, 1029, 47 CR2d 348 (suit by driver who left scene due to fear of defendant driver who had repeatedly collided with plaintiff's car).

A driver who, without excuse, violates these hit-and-run statutes is liable for the further injury that results even if the driver was not responsible for the accident. *Brooks v E.J. Willig Truck Transp. Co.* (1953) 40 C2d 669, 679, 255 P2d 802, 808; *Karl v C.A. Reed Lumber Co.* (1969) 275 CA2d 358, 361, 79 CR 852, 853; *Escobedo v Travelers Ins. Co.* (1964) 227 CA2d 353, 359, 38 CR 645, 649; *Summers v Dominguez* (1938) 29 CA2d 308, 312, 84 P2d 237, 239. See Anno, 80 ALR2d 299, 306 (1961).

An involved driver's failure to stop is evidence of consciousness of responsibility for the initial accident and injury. *Brooks v E.J. Willig Truck Transp. Co.* (1953) 40 C2d 669, 676, 255 P2d 802, 806; *Karl v C.A. Reed Lumber Co.* (1969) 275 CA2d 358, 362, 79 CR 852, 854. See Anno, 80 ALR2d 299, 301 (1961).

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§4.25 (8) Driving Under Influence of Alcohol or Drug

Driving a vehicle while under the influence of an intoxicating liquor, a drug, or both raises a presumption of negligence (see §4.10). See Veh C §23152(a); *People v Phillips* (1985) 168 CA3d 642, 646, 214 CR 417; *Christensen v Harmonson* (1952) 113 CA2d 175, 181, 247 P2d 956, 959. See also *Zamucen v Crocker* (1957) 149 CA2d 312, 316, 308 P2d 384, 387. See Anno, 32 ALR5th 659 (1995) (applicability of DUI laws to drivers of mopeds and other small motorized vehicles).

It must be shown that the driver was affected by the liquor or drug—that his physical or mental abilities were so impaired that he could not drive with the caution or ability of a person of ordinary prudence and skill in similar circumstances—and a person who has taken one or more drinks is not necessarily under the influence. See *Pittman v Boiven* (1967) 249 CA2d 207, 217, 57 CR 319, 326. See Anno, 64 ALR4th 298 (1988) ("choice of evils" as defense to drunk driving).

The driver's intoxication may be found to have contributed to causing a collision even without evidence of a violation of any other traffic regulation. In determining whether the driver violated Veh C §23152(a), the trier of fact may consider evidence of the number of drinks taken, the driver's appearance and conduct, odor of alcohol, measured blood alcohol content, and expert opinion on the effect of blood alcohol level on, *e.g.,* peripheral vision and reflex time. See *Hyatt v Sierra Boat Co.* (1978) 79 CA3d 325, 334, 145 CR 47.

NOTE: It is unclear whether Veh C §23152(b)—which makes it unlawful to drive a vehicle with 0.08 percent blood alcohol, whether or not the driver is under the influence—may be invoked in civil cases. The 0.08 percent presumption of intoxication in Veh C §23610(a)(3) is expressly limited to criminal cases. See *Hyatt v Sierra Boat Co., supra*.

On a driver's refusal to submit to a blood alcohol test as circumstantial evidence of consciousness of guilt even if the arresting officer does not advise him that the refusal may be used against him, see *People v Municipal Court* (Gonzales) (1982) 137 CA3d 114, 119, 186 CR 716.

A person who voluntarily drinks to the point of intoxication before driving may be subject to punitive damages. See Note in §4.26. An intoxicated driver, however, is not subject to strict liability under the ultrahazardous activity rule. *Goodwin v Reilley* (1985) 176 CA3d 86, 92, 221 CR 374. See generally §§4.76, 4.80.

The prevailing plaintiff in a personal injury action based on the defendant's intoxication may recover attorney fees under CCP §1021.4 if the defendant was convicted of felony drunk driving. *Sommers v Erb* (1992) 2 CA4th 1644, 1650, 4 CR2d 52 (plaintiff's fault, if any, is a factor to consider in exercising discretion).

An employer has no cause of action against an intoxicated driver for injuring an employee; such conduct does not amount to intentional disruption of the employer's business. *Herrick v Superior Court* (1987) 188 CA3d 787, 793, 233 CR 675.

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§4.26 3. Intentional, Willful, and Reckless Misconduct

A driver is liable for injuries caused by driving with an intent to cause injury, or, even without an intent to injure, with either (a) knowledge that serious injury is a probable result or (b) a wanton and reckless disregard of the possible consequences of driving in a particular manner. *Reuther v Viall* (1965) 62 C2d 470, 475, 42 CR 456, 459 (driver took eyes off road to look for dropped lighter and car crossed center line); *Emery v Emery* (1955) 45 C2d 421, 426, 289 P2d 218, 221 (driving while "sleepy and drowsy"); *Weber v Pinyan* (1937) 9 C2d 226, 233, 70 P2d 183, 186 (excessive speed; attempt to kiss passenger); *Meek v Fowler* (1935) 3 C2d 420, 426, 45 P2d 194, 197 (high speed).

Failure to perform a statutory duty, combined with knowledge that serious injury will probably result, or with a wanton and reckless disregard of the possible consequences, constitutes willful misconduct, although the mere failure to perform a statutory duty does not. *Schwalbe v Jones* (1976) 16 C3d 514, 524, 128 CR 321, overruled on other grounds at 21 C3d 855.

NOTE: Before California's 1975 adoption of the comparative fault system, showing a defendant's willful misconduct negated the contributory negligence defense and the defense provided by the former automobile guest statute; it now appears that a driver's intent to injure or reckless misconduct, however egregious, is a form of fault that is to be compared with the injured person's negligence or other fault in ascertaining the latter's damages. See §§1.41, 1.45, 1.57-1.59. Such fault may, however, constitute the malice that supports a punitive damages award. See *Taylor v Superior Court* (1979) 24 C3d 890, 897, 157 CR 693 (drinking to point of intoxication before driving); *Dawes v Superior Court* (1980) 111 CA3d 82, 88, 168 CR 319 (intoxication coupled with other violations and recklessness). See also *Busboom v Superior Court* (1980) 113 CA3d 550, 554, 169 CR 886. See Anno, 33 ALR5th 303 (1995) (driver's intoxication as basis for punitive damages). But see *Sumpter v Matteson* (2008) 158 CA4th 928, 70 CR3d 495 (despite substantial evidence that defendant drove with conscious disregard of others' safety, jury could find he acted without malice and deny punitive damages). For a comprehensive discussion of punitive damages, see California Tort Damages, chap 14 (2d ed Cal CEB 2002) with latest update.

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§4.27 4. Duty to Riders in Vehicle

A driver's duty to use ordinary care and skill in operating a vehicle (see §§4.2-4.9) and to comply with traffic regulations (see §§4.10-4.25) are owed to riders in the vehicle (passengers), as well as to pedestrians and persons in other vehicles.

NOTE: California's former automobile guest statute (formerly in Veh C §17158), which restricted a driver's liability to nonpaying passengers, was held unconstitutional in *Brown v Merlo* (1973) 8 C3d 855, 106 CR 388, on equal protection grounds.

The fact that the injured rider was an owner of the vehicle does not limit liability of the driver who failed to use ordinary care and skill or to comply with traffic regulations. *Cooper v Bray* (1978) 21 C3d 841, 148 CR 148 (Veh C §17158 unconstitutional regarding owner-passenger); *Monroe v Monroe* (1979) 90 CA3d 388, 391, 153 CR 384 (guest law unconstitutional regarding passenger who was co-owner-spouse of driver).

The seatbelt statutes (Veh C §§27315-27366) apply to drivers of motor vehicles as well as to owners and others. The operator of any private motor vehicle must require all passengers of specified ages or weights to be properly restrained by seatbelts or a "child passenger restraint system" (Veh C §§27315(d), 27360.5(b)) unless the passenger has a disability or medical condition preventing appropriate restraint or comes within an "emergency vehicle" exception (Veh C §27315(g)). On the seatbelt responsibility of others, see §4.39 (owners), chaps 5 (Carriers), 11 (Product Liability).

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B. Owners

§4.28 1. Vicarious Liability for Permissive Use

The owner of a motor vehicle is liable for injury resulting from its negligent or wrongful operation by a permissive user, even when the user is not an employee. Veh C §§17150, 17154. The owner's liability under Veh C §§17150, 17154 is vicarious, existing only to the extent that the driver is liable for, but cannot pay, damages. See §4.29 (monetary limits on owner's liability).

NOTE: Provisions in the 2005 federal transportation funding act appear to be intended to preempt and nullify, with respect to motor vehicle renting and leasing companies, the vicarious liability laws of California and other states. The injured person must sue the driver, as well as the owner, and the first recourse is to the driver's assets. Veh C §17152. Any payments made to the injured person after judgment reduce the amount of the owner's liability. See *Heves v Kershaw* (1961) 198 CA2d 340, 342, 17 CR 837, 838. The owner who pays a judgment is subrogated to the rights of the injured person against the driver. Veh C §17153.

The vehicle owner's liability law is intended to protect the injured person; a cotortfeasor who is held jointly liable with the driver cannot obtain contribution from the owner. *Southern Pac. Transp. Co. v Dolan* (1972) 27 CA3d 534, 541, 104 CR 131, 135 (questioned in case involving parental liability for sexual assault, *Curry v Superior Court* (1993) 20 CA4th 180, 184, 24 CR2d 495).

A settlement between the injured person and the owner does not discharge the driver from liability, although the recovery from the driver is reduced by the amount received from the owner. *Kemp v Barnett* (1976) 62 CA3d 245, 132 CR 823.

NOTE: Settlement with a vehicle owner for less than the full amount of the statutory monetary limit may have the effect of precluding the plaintiff from recovering under the underinsured motorist provisions of his or her own insurance policy. See *Farmers Ins. Exch. v Hurley* (1999) 76 CA4th 797, 90 CR2d 697.

On the other hand, a plaintiff's settlement with the driver for the statutory limit (see §4.29) or more discharges the owner's statutory liability. *Fenley v Kristoffersen* (1979) 94 CA3d 139, 142, 156 CR 187. The owner's statutory liability is also discharged by a full satisfaction of judgment against the driver for a lesser amount. *Burton v Gardner Motors, Inc.* (1981) 117 CA3d 426, 432, 172 CR 647 (satisfaction of judgment after acceptance of driver's offer of $8500 under CCP §998).

A plaintiff is entitled to have the owner added to an unsatisfied judgment against the driver for the owner's statutory liability when ownership and permissive use are alleged and proved, although the plaintiff unsuccessfully sought to recover against the owner for negligent entrustment (see §4.38). *Walker v Belvedere* (1993) 16 CA4th 1663, 1669, 1670, 20 CR2d 773. See Anno, 30 ALR4th 838 (1984) (allowing plaintiff to proceed against owner for negligent entrustment when owner admits liability under another theory of liability).

Proposition 51 (CC §1431.2; see §1.69), which proportionally limits a defendant's liability for noneconomic damages, does not apply to an owner's Veh C §17150 liability. *Rashtian v BRAC-BH, Inc.* (1992) 9 CA4th 1847, 1854, 12 CR2d 411 (owner's liability is vicarious and imposed regardless of fault). On the other hand, a Proposition 51 fault percentage is assigned to an owner who is liable for negligently entrusting his or her vehicle to an unlicensed driver. See *Bayer-Bel v Litovsky* (2008) 159 CA4th 396, 71 CR3d 518 (driver not jointly and severally liable for noneconomic damages).

The owner of a vehicle that is not self-propelled (see Veh C §415) is not subject to Veh C §17150 liability. *Miller v Berman* (1942) 55 CA2d 569, 572, 131 P2d 18, 20 (owner of trailer attached to another person's motor vehicle).

See Annos, 37 ALR4th 565 (1985) (rights of passenger who owned negligently driven vehicle), 21 ALR4th 459 (1983) (owner's liability for mechanic's negligence), 8 ALR4th 265 (1981) (vehicle owner's liability for negligence of garage man or mechanic), 43 ALR2d 879 (1955) (owner's right to indemnity from negligent driver or driver's employer), 13 ALR2d 378 (1950) (what constitutes "operation" of motor vehicle within owner's liability statute).

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§4.29 a. Liability Limits

A motor vehicle owner's (or owner's bailee's) vicarious liability under Veh C §17150 (see §4.28) is limited to $15,000 per person, $30,000 per accident for injury, and $5,000 per accident for property damage, and there is no imputed liability for punitive damages. Veh C §17151. See *Soils v Oilfields Trucking Co.* (1979) 90 CA3d 349, 353, 153 CR 371 (liability of owner of commercial truck limited to statutory amounts absent proof of driver's agency or employment).

When two or more persons are injured or killed in one accident, the owner or bailee may pay bona fide claims with or without judgment, and the vicarious liability is extinguished when payments total $30,000. Veh C §17155.

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b. Who Is an Owner

§4.30 (1) Co-Owners; Legal, Registered, and True Owners; Personal Representatives

Persons subject to Veh C §17150 include the following:

- The registered owner of the vehicle (*Dorsey v Barba* (1952) 38 C2d 350, 353, 240 P2d 604, overruled on other grounds at 66 C2d 828; *Borjesson v Simpson* (1960) 177 CA2d 365, 368, 2 CR 366, 367); but see *Savnik v Hall* (1999) 74 CA4th 733, 88 CR2d 417 (for purposes of CC §3333.4 (see §4.81) injured passenger was not necessarily an owner of vehicle that driver had registered in both his name and hers);
- Each co-owner when the vehicle was driven by another co-owner (*Knight v Cook* (1963) 212 CA2d 613, 616, 28 CR 273; *Leatherbury v Favel* (1951) 106 CA2d 112, 113, 234 P2d 711), or other permissive user (but see *Ieremia v Hilmar Unified Sch. Dist.* (2008) 166 CA4th 324, 82 CR3d 658 (unknowing possession of community property interest did not constitute ownership under CC §3333.4; see §4.81));
- The true owner or co-owner, whether or not the vehicle is registered to him (*Stoddart v Peirce* (1959) 53 C2d 105, 116, 346 P2d 774, 779 (not registered to true owner); *Dorsey v Barba, supra* (registered co-owner); *McClary v Concord Ave. Motors* (1962) 202 CA2d 564, 21 CR 1 (unregistered true owner); *Rody v Winn* (1958) 162 CA2d 35, 39, 327 P2d 579, disapproved on other grounds at 59 C2d 666 (unregistered co-owner); see Anno, 74 ALR3d 739 (1976) (who is "owner" within statutory ownership liability));
- Members of an unincorporated association, one of whom was the registered owner (*Steuer v Phelps* (1974) 41 CA3d 468, 116 CR 61; and
- The personal representative of a decedent during estate administration (Veh C §17159).

However, a legal owner holding only a security interest and not in possession, or a seller under a conditional sales agreement, is not vicariously liable under the statute. Veh C §17156. See *Oppenheimer v Gordon* (1956) 141 CA2d 833, 835, 297 P2d 808, 810. The lease of a motor vehicle amounts to a conditional sales agreement if the lease payments are substantially equivalent to or in excess of the vehicle's value when leased and if the lessee becomes, or has the option to become, the owner of the vehicle on completion of the lease for no other, or for nominal, consideration. See CC §2981(a)(2); *Estate of Gonzales* (1990) 219 CA3d 1598, 1603, 269 CR 68 (lease not conditional sale when neither condition met); *Klein v Leatherman* (1969) 270 CA2d 792, 793, 76 CR 190, 191 (lessee's option to buy for $1 showed conditional sale).

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§4.31 (2) Spouses

A husband or wife can be liable as a vehicle owner under Veh C §17150 when his or her spouse is the permissive user whose negligence caused injury even if the spouse is the vehicle's co-owner. See *Dorsey v Barba* (1952) 38 C2d 350, 240 P2d 604, overruled on other grounds at 66 C2d 828. See also *Monroe v Monroe* (1979) 90 CA3d 388, 392, 153 CR 384 (husband-driver liable to wife-passenger for negligent operation).

Whether the spouse-driver was using the vehicle with the spouse-owner's permission is a question of fact. *Krum v Malloy* (1943) 22 C2d 132, 136, 137 P2d 18, 20. It may be inferred, absent evidence on the issue, that one co-owner consented to use by the other. See *Bruce v Ullery* (1962) 58 C2d 702, 712, 25 CR 841, 846.

NOTE: Under pre-1975 law, when husbands had management and control of community personal property, cases held that, for lack of control, a wife was not liable as an owner of a community property automobile for injuries caused by her husband. See *Shepardson v McLellan* (1963) 59 C2d 83, 87, 27 CR 884, 887; *Cooke v Tsipouroglou* (1963) 59 C2d 660, 663, 31 CR 60, 61. Now, however, Fam C §1100(a) states that either spouse has the management and control of community personal property. See also Veh C §17150.5 (Fam C §803 presumptions do not apply).

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§4.32 (3) Effect of Sale; Transfer Requirements

The seller or other transferor of a vehicle is not liable as an owner for an accident occurring after transfer requirements, specified in Veh C §5602, are met. *Stoddart v Peirce* (1959) 53 C2d 105, 120, 346 P2d 774, 782 (substantial, if not literal, compliance); *Hidalgo v Anderson* (1978) 84 CA3d 378, 148 CR 557; *Knudsen v Faubus* (1962) 199 CA2d 659, 661, 19 CR 17, 18. The buyer's compliance is sufficient. *Richie v Tate Motors, Inc.* (1971) 22 CA3d 238, 244, 99 CR 223. It is also sufficient if the transfer was made in another state in compliance with the law of that state. *500 Motors, Inc. v Superior Court* (1981) 122 CA3d 827, 831, 176 CR 349.

Conversely, ownership liability continues until the following occur:

- A good faith sale or transfer of the vehicle and its possession (*Helton v Stewart* (1961) 198 CA2d 114, 120, 17 CR 524, 527); and
- At least substantial compliance with the transfer requirements (*Brennan v Gordon Ball, Inc.* (1985) 163 CA3d 832, 837, 210 CR 32 (certified mailing to buyer's last known address did not satisfy delivery requirement of Veh C §5602(a)); *Nuss v Pacht* (1971) 22 CA3d 553, 557, 99 CR 460 (failure to date endorsement of ownership certificate); *Ellis v Community Chevrolet, Inc.* (1966) 242 CA2d 79, 83, 51 CR 154, 156 (notice of sale omitted name of one buyer); *Somerville v Providence Wash. Indem. Co.* (1963) 218 CA2d 237, 247, 32 CR 378, 383 (failure to notify Department of Motor Vehicles immediately)).

The burden of proving compliance lies with defendants who claim to have sold the vehicle before the accident occurred. *Enis v Specialty Auto Sales* (1978) 83 CA3d 928, 148 CR 255. See *Spangle v Farmers Ins. Exch.* (2008) 166 CA4th 560, 82 CR3d 763 (triable issue whether seller had sufficiently complied with transfer requirement and thus whether buyer was owner or seller's permissive user, covered by seller's "garage operations" liability policy).

Because the principal purpose of the statutes is to afford ready information about ownership to those injured or damaged by automobiles, technical omissions unrelated to that purpose do not leave the seller liable as an owner. *Scoggins v Kristoff* (1979) 96 CA3d 771, 775, 158 CR 244 (compliance with Veh C §5602 released seller who had not complied with smog requirements of Veh C §24007(b)); *Bambaciagno v Bodenhausen* (1979) 88 CA3d 538, 541, 151 CR 827 (failure to give notice of mileage at time of sale).

The purported transfer of a vehicle's title to a deceased person does not vitiate the transferor's insurance coverage, at least absent a conflicting definition of "owner" in the policy. See *Liberty Mutual Fire Ins. Co. v McKenzie* (2001) 88 CA4th 681, 105 CR2d 910.

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§4.33 c. Permission to Use Vehicle

The owner's vicarious liability requires proof of permissive use as well as ownership, and the mere fact of the driver's possession does not ordinarily establish permission. *Scheff v Roberts* (1950) 35 C2d 10, 12, 215 P2d 925, 926 (company truck taken without permission); *Garmon v Sebastian* (1960) 181 CA2d 254, 260, 5 CR 101, 105 (car left at carwash); *Mucci v Winter* (1951) 103 CA2d 627, 631, 230 P2d 22, 24 (friend "borrowed" car without permission). See *Krum v Malloy* (1943) 22 C2d 132, 135, 137 P2d 18, 20 (whether driver had co-owner's permission is fact question).

NOTE: A provision in an owner's automobile liability insurance policy that purports to limit the insurer's liability for injury caused by an otherwise covered permissive user through a clause placed inconspicuously in a section of the policy headed "Other Insurance" is unenforceable. *Haynes v Farmers Ins. Exch.* (2004 32 C4th 1198, 1202, 13 CR3d 68 (provision not sufficiently "conspicuous, plain and clear"). An automobile insurance policy can exclude from coverage injury caused by a permissive user of a vehicle not owned by the insured. See *Gilmer v State Farm Mut. Auto. Ins. Co.* (2003) 110 CA4th 416, 1 CR3d 756.

See Annos, 103 ALR5th 339 (2002) (what constitutes "use" or "operation" of vehicle), 41 ALR3d 1055 (1972) (liability for attendant's negligence in parking patron's automobile), 15 ALR3d 1387 (1967) (liability of owner or operator of vehicle being repaired or serviced).

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Source: Torts/California Tort Guide/4 Automobiles/§4.34 (1) Implied Permission

§4.34 (1) Implied Permission

Implied permission to use a vehicle may sometimes be found from the circumstances, even if the owner did not know of the particular intended use and both owner and driver deny that permission was given. *Scheff v Roberts* (1950) 35 C2d 10, 15, 215 P2d 925, 927; *Burgess v Cahill* (1945) 26 C2d 320, 323, 158 P2d 393, 395; *Anderson v Wagnon* (1952) 110 CA2d 362, 367, 242 P2d 915, 918; *Steuer v Phelps* (1974) 41 CA3d 468, 472, 116 CR 61 (members of church association liable for use of association car by one member for church purposes).

Consent is more readily inferred if the owner and driver have an employment or family relationship. *Burgess v Cahill* (1945) 26 C2d 320, 324, 158 P2d 393, 395 (employment); *Hicks v Reis* (1943) 21 C2d 654, 659, 134 P2d 788, 791 (same); *Fremont Compensation Ins. Co. v Hartnett* (1993) 19 CA4th 669, 675, 23 CR2d 567 (family). In these cases, the inference is not necessarily rebutted by testimony that the use was prohibited. *Scheff v Roberts* (1950) 35 C2d 10, 15, 215 P2d 925, 928; *Blank v Coffin* (1942) 20 C2d 457, 462, 126 P2d 868, 871; *Pierce v Standow* (1958) 163 CA2d 286, 288, 329 P2d 44, 45. See *Safeco Ins. Co. of Am. v Thomas* (1966) 244 CA2d 204, 208, 52 CR 910, 913.

Factors that jurors may consider in determining whether a driver had an owner's implied permission to use a vehicle include an employment relationship between the two, a custom or practice of allowing employees to use the owner's vehicles, and the owner's failure to monitor or supervise employees' uses of vehicles. *Taylor v Roseville Toyota, Inc.* (2006) 138 CA4th 994, 42 CR3d 68 (evidence supported finding that car dealer's employee had implied permission to use car for personal errand).

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Source: Torts/California Tort Guide/4 Automobiles/§4.35 (2) Restrictions on Permission

§4.35 (2) Restrictions on Permission

The driver's violation of the owner's instructions on the *manner of operation* does not vitiate the permission the owner has given. See *Peterson v Grieger, Inc.* (1961) 57 C2d 43, 55, 17 CR 828, 835; *Henrietta v Evans* (1938) 10 C2d 526, 529, 75 P2d 1051, 1053. But an owner who restricts the consent with respect to time, place, area, or purpose, may be absolved by a substantial violation. *Engstrom v Auburn Auto. Sales Corp.* (1938) 11 C2d 64, 69, 77 P2d 1059, 1064 (time); *Henrietta v Evans* (1938) 10 C2d 526, 528, 75 P2d 1051, 1052 (purpose, place); *Garmon v Sebastian* (1960) 181 CA2d 254, 260, 5 CR 101, 105 (area); *Burdine v Severin Motors, Inc.* (1957) 147 CA2d 751, 757, 305 P2d 1008, 1011 (purpose).

It is a question of fact whether a claimed restriction was

- actually imposed by the owner (see *Pierce v Standow* (1958) 163 CA2d 286, 288, 329 P2d 44, 45), and
- substantially violated (*Peterson v Grieger, Inc.* (1961) 57 C2d 43, 52, 17 CR 828, 833; *Garmon v Sebastian, supra*; *Fountain v Bank of America* (1952) 109 CA2d 90, 98, 240 P2d 414, 419; see *Hartford Acc. & Indem. Co. v Abdullah* (1979) 94 CA3d 81, 90, 156 CR 254 (substantial deviation precluded automobile insurance coverage of driver)).

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§4.36 (3) Use by Subpermittee

An owner's permittee has implied authority to entrust the vehicle to a subpermittee, and the owner is liable for the latter's wrongful conduct, despite the owner's stated restriction against use by others. *Souza v Corti* (1943) 22 C2d 454, 460, 139 P2d 645, 648 (father told son not to lend car to anyone). See *Herbert v Cassinelli* (1943) 61 CA2d 661, 665, 143 P2d 752, 754.

The fact that the subpermittee is unlicensed does not relieve the owner of liability. *Peterson v Grieger, Inc.* (1961) 57 C2d 43, 55, 17 CR 828, 835. On the other hand, an automobile rental agreement may limit the lessor's ownership liability to injuries caused by persons named in the agreement. See *Marquez v Enterprise Rent-a-Car* (1997) 53 CA4th 319, 61 CR2d 557 (lessee had initialed typed-in statement that there would be no other drivers; lessor not liable for injury caused by sublessee). A statement of nonliability for other drivers may be ineffective if not sufficiently prominent in the agreement. See *Financial Indem. Co. v Hertz Corp.* (1964) 226 CA2d 689, 38 CR 249. But see *Baker v Liberty Mut. Ins. Co.* (9th Cir 1998) 143 F3d 1260 (car dealer that gave "loaner" to customer under agreement that prohibited use by others not liable for injury caused by unlicensed 13-year-old who did not have customer's express permission).

On insurance coverage for permissive users, see *Sandoval v Mercury Ins. Group* (1991) 229 CA3d 1, 9, 278 CR 533 (no coverage when owner/employer expressly told driver/employee not to use the vehicle until he became licensed).

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§4.37 d. Availability of Driver's Defenses to Owner

The owner may assert defenses that apply to himself or are common to both owner and driver but may not assert defenses personal to the driver. *Baugh v Rogers* (1944) 24 C2d 200, 213, 148 P2d 633, 640 (although workers' compensation exclusivity immunized driver/employer from damages liability to plaintiff, owner was not immune, and driver/employer was required to reimburse owner); *Galvis v Petito* (1993) 13 CA4th 551, 560, 16 CR2d 560 (vehicle owner, who was neither employer nor coemployee of injured passengers, not entitled to driver's exclusivity immunity); *Van Meter v Reed* (1962) 207 CA2d 866, 868, 24 CR 688, 689 (owner liable to plaintiff although driver, plaintiff's coemployee, was immune).

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Source: Torts/California Tort Guide/4 Automobiles/§4.38 2. Negligent Entrustment

§4.38 2. Negligent Entrustment

A vehicle owner is liable for injuries resulting from negligently entrusting the vehicle to an unfit, incompetent, or reckless driver. This common law liability is not subject to Veh C §17150 limitations on an owner's liability (see §§4.28-4.29), nor is it dependent on the driver's having been at fault. *Syah v Johnson* (1966) 247 CA2d 534, 538, 55 CR 741, 744 (entrustment to person subject to seizures); *Reclusado v Mangum* (1964) 228 CA2d 8, 11, 39 CR 157, 159 (15-year-old with learner's permit); *Nault v Smith* (1961) 194 CA2d 257, 267, 14 CR 889, 895 (unlicensed minor driving jeep). For a jury instruction on negligent entrustment, see CACI 724 (2003).

A co-owner may be liable for negligently entrusting the vehicle to an unfit co-owner. *Krum v Malloy* (1943) 22 C2d 132, 135, 137 P2d 18; *Mettelka v Superior Court* (1985) 173 CA3d 1245, 1250, 219 CR 697. Similarly, a permittee or a bailee may be liable for negligent entrustment to an unfit subpermittee. *Jones v Ayers* (1963) 212 CA2d 646, 659, 28 CR 223, 232.

It must be shown that the owner knew or should have known of the driver's unfitness (*Johnson v Casetta* (1961) 197 CA2d 272, 274, 17 CR 81) as manifested by the following:

- Inexperience (*Reclusado v Mangum, supra*),
- Lack of license (*Nault v Smith, supra*; *Owens v Carmichael's U-Drive Autos, Inc.* (1931) 116 CA 348, 350, 2 P2d 580; see Veh C §§14606-14608; see Anno, 69 ALR2d 978 (1960) (statutes imputing negligence to anyone who permits unlicensed person to drive)),
- Previous recklessness (*Allen v Toledo* (1980) 109 CA3d 415, 422, 167 CR 270; *Kanananakoa v Badalamente* (1931) 119 CA 231, 233, 6 P2d 338; *Rocca v Steinmetz* (1923) 61 CA 102, 109, 214 P 257),
- Physical infirmities (*Syah v Johnson, supra* (epileptic symptoms)),
- Age (*McCalla v Grosse* (1941) 42 CA2d 546, 550, 109 P2d 358 (80-year-old with defective eyesight); see *Grafton v Mollica* (1965) 231 CA2d 860, 863, 42 CR 306 (small boy left in operative car)), or
- Intoxication (*Blake v Moore* (1984) 162 CA3d 700, 707, 208 CR 703 (injury to intoxicated driver; see Anno, 91 ALR5th 1 (2001) (liability for entrusting automobile to intoxicated person or one known to be excessive user of intoxicants))).

A rental agency, however, is not liable to persons injured by a lessee from another country solely because of the agency's failure to determine the lessee's familiarity with California traffic rules; under Veh C §14608, the agency's duty is limited to ensuring that the lessee has a valid driver's license from his or her own country. *Lindstrom v Hertz Corp.* (2000) 81 CA4th 644, 96 CR2d 874 (lessee from England).

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§4.39 3. Failure to Equip and Maintain Safe Vehicle

A vehicle owner has a nondelegable duty to use reasonable care to equip and maintain the vehicle in compliance with the law. See *Maloney v Rath* (1968) 69 C2d 442, 446, 71 CR 897 (brakes).

The owner's duty is as follows:

- To equip the vehicle as required by statute and as necessary for its safe operation (see *Menchaca v Helms Bakeries, Inc.* (1968) 68 C2d 535, 540, 67 CR 775) and
- To maintain it in reasonably safe running condition (*Sherman v Frank* (1944) 63 CA2d 278, 282, 146 P2d 704 (tires); *Dunn v Shamoon* (1940) 37 CA2d 486, 489, 99 P2d 1113 (inadequately secured spare tire fell on highway)).

An owner's liability for negligently equipping or maintaining a vehicle is not affected by the statutory limitations that apply to an owner's liability under Veh C §17150. See *Benton v Sloss* (1952) 38 C2d 399, 403, 240 P2d 575; *Fremont Compensation Ins. Co. v Hartnett* (1993) 19 CA4th 669, 676, 23 CR2d 567.

Failure to equip or maintain a vehicle as required by law gives rise to a presumption of negligence (see §4.10). *Maloney v Rath* (1968) 69 C2d 442, 444, 71 CR 897; *Fremont Compensation Ins. Co. v Hartnett, supra*; *Ponce v Black* (1964) 224 CA2d 159, 163, 36 CR 419. Because the duty is not delegable, the owner is liable for the negligence of an employee or independent contractor assigned to maintain the vehicle. *Maloney v Rath* (1968) 69 C2d 442, 448, 71 CR 897. To excuse an equipment failure, the owner must prove (a) that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law (see §4.10), and (b) the cause of the failure and that the failure was not due to the negligence of anyone hired or employed by the owner to install or repair the part that failed. *Harris v Irish Truck Lines, Inc.* (1974) 11 C3d 373, 380, 113 CR 489 (expert testimony may be required); *Clark v Dziabas* (1968) 69 C2d 449, 451, 71 CR 901 (owner must show that defect existed before he acquired vehicle and could not have been discovered later through reasonable inspection). See *Fremont Compensation Ins. Co. v Hartnett, supra*.

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§4.40 4. Failure to Take Precautions Against Theft

The owner of a vehicle who leaves it unlocked with the key in the ignition can be liable for injuries caused by negligent operation by a thief, if the theft and negligent operation were foreseeable under special circumstances relating to the nature of the vehicle and the place where it was left. *Carrera v Maurice J. Sopp & Son* (2009) 177 CA4th 366, 99 CR3d 268 (special circumstances included: keys left in ignition of large, powerful tow truck left unattended); *Palma v United States Indus. Fasteners, Inc.* (1984) 36 C3d 171, 186, 203 CR 626 (large commercial truck left unlocked overnight, keys in ignition, in open parking lot, in high crime area); *Hergenrether v East* (1964) 61 C2d 440, 445, 39 CR 4, 7 (two-ton truck left in "skid row"); *Richardson v Ham* (1955) 44 C2d 772, 776, 285 P2d 269, 271 (bulldozer parked overnight at construction site); *Duarte v City of San Jose* (1980) 100 CA3d 648, 659, 161 CR 140, disapproved on other grounds at 12 C4th 925 (see Note, below) (officer left drunk driver in police car, without handcuffs, with engine running); *Enders v Apcoa, Inc.* (1976) 55 CA3d 897, 127 CR 751 (insufficient precautions against theft in parking lot; foreseeability standard questioned in *Avis Rent A Car Sys. v Superior Court* (1993) 12 CA4th 221, 232, 15 CR2d 711); *Murray v Wright* (1958) 166 CA2d 589, 592, 333 P2d 111, 113 (used-car lot). See *Ballard v Uribe* (1986) 41 C3d 564, 573, 224 CR 664 (rule applied to worker's use of defective vehicle left in equipment yard with keys). See Anno, 45 ALR3d 787, 818 (1972) (liability of motorist who leaves key in ignition).

NOTE: *Ladd v County of San Mateo* (1996) 12 C4th 913, 925, 50 CR2d 309, discussed in §8.14, disapproves of the decision in *Duarte v City of San Jose, supra,* to the extent that *Duarte* could be read to hold that failure adequately to restrain a person in custody being transported in a motor vehicle constitutes, in itself, negligent operation of a vehicle within the meaning of Veh C §17001.

Conversely, absent special circumstances that establish foreseeability, merely leaving the ignition key does not establish liability. See *Richards v Stanley* (1954) 43 C2d 60, 63, 271 P2d 23, 25; *May v Nine Plus Props., Inc.* (2006) 143 CA4th 1538, 50 CR3d 13 (repair shop left cars in fenced and locked storage lot; special circumstances not shown); *Avis Rent A Car Sys. v Superior Court* (1993) 12 CA4th 221, 233, 15 CR2d 711 (cars parked in unattended lot); *Archer v Sybert* (1985) 167 CA3d 722, 729, 213 CR 486 (car left in residential area with "for sale" sign in window); *Kiick v Levias* (1980) 113 CA3d 399, 405, 169 CR 859 (car parked in low-theft residential area); *Hosking v San Pedro Marine, Inc.* (1979) 98 CA3d 98, 104, 159 CR 369 (truck left momentarily unattended near high school with lights on, door open, engine running); *England v Mapes Produce Co.* (1965) 238 CA2d 120, 127, 47 CR 506, 510 (trucks left unattended in migrant-worker camp). See also *Brooker v El Encino Co.* (1963) 216 CA2d 598, 601, 31 CR 24, 26 (bailee); *Holder v Reber* (1956) 146 CA2d 557, 558, 304 P2d 204; *Brooks v U.S.* (ND Cal 1999) 1999 US Dist Lexis 6909.

Violation of a statute or ordinance whose purpose is to prevent the use of vehicles by unfit drivers may be actionable negligence. See *Richards v Stanley* (1954) 43 C2d 60, 62, 271 P2d 23, 25 (dictum).

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C. Adults Liable for Minors' Fault

§4.41 1. Signing Minor's Driver's License Application

The parent, guardian, adult spouse, or employer who signs and verifies a minor's driver's license application is jointly and severally liable with the minor for damage caused by the minor's negligent or wrongful operation of a motor vehicle (Veh C §17707), unless the minor was acting as another person's agent or employee (Veh C §17710). See Veh C §§17700-17706.

This liability continues during the minority unless the minor's license is canceled (Veh C §§17711-17712) or involuntarily revoked (*Hamilton v Dick* (1967) 254 CA2d 123, 125, 61 CR 894, 896). See also *Sleeper v Woodmansee* (1936) 11 CA2d 595, 598, 54 P2d 519, 520 (temporary suspension insufficient).

An employer is liable under Veh C §§17706-17707 only when an unrestricted license was issued to the minor under the employer's written authorization. On employers' liability on other grounds, see §§4.45-4.62.

A sister state's judgment against a signing parent may be enforced in California when the minor caused injuries in the sister state while permissively operating the parent's vehicle in that state. *Indiana Ins. Co. v Pettigrew* (1981) 115 CA3d 862, 867, 171 CR 770.

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§4.42 2. Permitting Minor to Operate Vehicle

A parent or a guardian who expressly or impliedly permits a minor to drive on a highway is liable for injury or harm resulting from the minor's fault whether or not the minor is licensed. Veh C §17708. See *Espe v Salisbury* (1968) 262 CA2d 621, 625, 68 CR 796, 799 (permission must be proved); *Hughes v Wardwell* (1953) 117 CA2d 406, 407, 255 P2d 881, 882 (includes operation of vehicle owned by minor).

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§4.43 3. Liability Limits

The limits on the monetary liability of a person who is liable for signing a minor's license application or for permitting the minor to drive (see §§4.41-4.42) are currently the same as the limits on a vehicle owner's statutory liability (see §4.29), and there is no vicarious liability for punitive damages. Veh C §17709. These limits do not apply, however, if the minor was acting as the person's agent. *Johnson v Peterson* (1974) 38 CA3d 619, 113 CR 445 (minor drove to buy shoes for younger sister). See *Van Den Eikhof v Hocker* (1978) 87 CA3d 900, 905, 151 CR 456 (minor used father's business car for personal trip; not acting as father's agent).

The liability of the owner (Veh C §17150) is in addition to the liability of the adult responsible for the minor if these are different persons (*Sawyer v Zacavich* (1960) 178 CA2d 605, 608, 3 CR 6, 8) unless the owner and the license-application signer or parent are the same (Veh C §17714. See *Van Den Eikhof v Hocker* (1978) 87 CA3d 900, 903 n1, 151 CR 456; *Rogers v Foppiano* (1937) 23 CA2d 87, 92, 72 P2d 239, 241).

The parents' liability under Veh C §§17707-17708 is discharged on payment of the statutory limit by the child or an insurer. *Dow v Britt* (1974) 37 CA3d 868, 872, 112 CR 710, 712. See *Savage v Emery* (1967) 255 CA2d 603, 605, 63 CR 566 (satisfaction of judgment against minor and owner).

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§4.44 D. Supervisors of Drivers With Instruction Permits

The adult licensed driver who is supervising the training of a driver with an instruction permit must be in a position in the driver's compartment to assist the driver in controlling the vehicle as necessary to avoid a collision and to provide immediate guidance in its safe operation. Veh C §12509(d).

Such a licensed driver is liable for negligently supervising the learner, and this liability may exceed the monetary limits in Veh C §17709 (see §4.43). *Kostecky v Henry* (1980) 113 CA3d 362, 370, 170 CR 197 (failure to prevent driver from making left turn in front of oncoming car).

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E. Employers and Principals

§4.45 1. Respondeat Superior

An employer (or principal) is liable under the respondeat superior principle for injuries caused by an employee's (or agent's) negligent or wrongful operation of a motor vehicle while acting within the scope of the employment. See CC §2338; *Hinman v Westinghouse Elec. Co.* (1970) 2 C3d 956, 959, 88 CR 188 (employer liable for risks inherent in or created by its enterprise); *U.S. v Romitti* (9th Cir 1966) 363 F2d 662, 665 (employer bears risks incidental to serving its business or purposes). Respondeat superior is not limited to business enterprises. *Miller v Stouffer* (1992) 9 CA4th 70, 80, 11 CR2d 454 (household employee).

An employer may be subject to punitive damages liability for misconduct in the operation of a motor vehicle by a managerial employee acting within the scope of employment. *Dawes v Superior Court* (1980) 111 CA3d 82, 91, 168 CR 319. See CC §3294(b) for restrictions on such liability.

Proposition 51 (CC §1431.2; see §1.69), requiring an apportionment of noneconomic damages based on each tortfeasor's comparative fault, does not apply to an employer's vicarious liability under respondeat superior. *Miller v Stouffer* (1992) 9 CA4th 70, 85, 11 CR2d 454. A plaintiff's good faith settlement with an employee reduces the claim against the employer but does not release the employer from respondeat superior liability. *Mayhugh v County of Orange* (1983) 141 CA3d 763, 766, 190 CR 537. See CCP §877.

Respondeat superior liability requires proof that the driver was an employee or an actual or ostensible agent of the defendant; it is not sufficient that the defendant's vehicle was being operated by another with his permission. *Soils v Oilfields Trucking Co.* (1979) 90 CA3d 349, 354, 153 CR 371 (commercial truck); *Van Den Eikhof v Hocker* (1978) 87 CA3d 900, 905, 151 CR 456 (daughter drove father's business car on personal trip); see §4.54 (inference of scope of employment when driver was employee).

A defendant may sometimes avoid respondeat superior liability by proving that the driver was an independent contractor, not an employee. *Flores v Brown* (1952) 39 C2d 622, 628, 248 P2d 922, 925. For exceptions, see §§4.60-4.62. See §§4.46-4.52 on distinguishing employees from independent contractors.

An employer not named or referred to in a complaint or cross-complaint against a driver may assert a statute of limitations defense if added to the suit after the applicable period has run. See *Boyer v Jensen* (2005) 129 CA4th 62, 28 CR3d 124 (employer added late to cross-complaint against driver against whom claim was discharged in bankruptcy).

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§4.46 a. Distinguishing Employee From Independent Contractor

Whether a driver was an employee or an independent contractor is usually a question of fact to be determined from all the circumstances of the relationships of the parties. See *Housewright v Pacific Far East Line, Inc.* (1964) 229 CA2d 259, 265, 40 CR 208, 212. Major determinants are discussed in §§4.47-4.48. Other factors are listed in Restatement (Second) of Agency §220 (1958) and applied in cases such as *Malloy v Fong* (1951) 37 C2d 356, 371, 232 P2d 241, 250. For more on the distinction, see California Workers' Damages Practice §4.22 (2d ed Cal CEB 2001).

The presumption that a person is an employee when hired to do work for which a contractor's license is required (Lab C §2750.5) is not limited to workers' compensation cases. *Foss v Anthony Indus.* (1983) 139 CA3d 794, 799, 189 CR 31. For more on this presumption, see Workers' Damages §§4.23-4.24.

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§4.47 (1) Right to Control

The most important factor in establishing whether a driver was an employee or an independent contractor is the employer's right to control the manner and means by which the driver accomplishes the desired result. *Largey v Intrastate Radiotelephone, Inc.* (1982) 136 CA3d 660, 667, 186 CR 520; *Housewright v Pacific Far East Line, Inc.* (1964) 229 CA2d 259, 266, 40 CR 208, 212.

The *right* to control establishes the employment relationship; it is not essential that the employer have exercised control over the employee's activities or have actually supervised him. See *Malloy v Fong* (1951) 37 C2d 356, 370, 232 P2d 241 (minister and assistant, driving Bible school students, were agents of presbytery). See also *Baugh v Rogers* (1944) 24 C2d 200, 206, 148 P2d 633, 637.

Existence of the right to control can be tested by determining whether, if instructions were given, they would have to be obeyed. *Villanazul v City of Los Angeles* (1951) 37 C2d 718, 721, 235 P2d 16, 18. An actual exercise of control is evidence of the right to control. *Lewis v Constitution Life Ins. Co. of Am.* (1950) 96 CA2d 191, 196, 215 P2d 55, 58 (life insurance salesman).

An independent contractor, on the other hand, renders service in the course of an independent employment or occupation and follows the hirer's desires only as to the results of the work, not as to the means by which the result is to be accomplished. See Lab C §3353; *Flores v Brown* (1952) 39 C2d 622, 628, 248 P2d 922, 925 (trucker); *Clarke v Hernandez* (1947) 79 CA2d 414, 423, 179 P2d 834, 840 (licensed contract hauler); Restatement (Second) of Agency §2 (1958). See also *McDonald v Shell Oil Co.* (1955) 44 C2d 785, 788, 285 P2d 902, 903 (crew removed casings for oil well owner); *Sills v Siller* (1963) 218 CA2d 735, 739, 32 CR 621, 624 (logger cut timber for mill owners); *Sparks v L.D. Folsom Co.* (1963) 217 CA2d 279, 285, 31 CR 640, 643 (co-owner of bulldozer hired out to contractor).

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Source: Torts/California Tort Guide/4 Automobiles/§4.48 (2) Right to Fire or to Quit

§4.48 (2) Right to Fire or to Quit

An employer's right to discharge the employee at will and without cause is strong evidence of the right to control, and is thus evidence that the relationship is employment, not independent contract. *Villanazul v City of Los Angeles* (1951) 37 C2d 718, 721, 235 P2d 16, 18 (deputy marshal); *Malloy v Fong* (1951) 37 C2d 356, 370, 232 P2d 241, 249 (minister); *Burlingham v Gray* (1943) 22 C2d 87, 100, 137 P2d 9, 16 (newspaper distributor). See also *City of Los Angeles v Vaughn* (1961) 55 C2d 198, 201, 10 CR 457, 459 (court reporter). A hirer cannot terminate the services of an independent contractor without becoming liable for breach of contract. See *Clarke v Hernandez* (1947) 79 CA2d 414, 424, 179 P2d 834, 840.

Similarly, an employee has the right to quit the job at any time; an independent contractor is legally obligated to complete the contract. See *Baugh v Rogers* (1944) 24 C2d 200, 206, 148 P2d 633, 637 (office cleaning woman); *Phillips v Larrabee* (1939) 32 CA2d 720, 725, 90 P2d 820, 823 (sewing machine salesman). See also *Clarke v Hernandez* (1947) 79 CA2d 414, 423, 179 P2d 834, 840.

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(3) Special Occupations

§4.49 (a) Truckers; Delivery Drivers

A trucker hired to haul a load is ordinarily an independent contractor. See *Flores v Brown* (1952) 39 C2d 622, 628, 248 P2d 922, 925 (trucker pulled another trucker's trailer); *Clarke v Hernandez* (1947) 79 CA2d 414, 424, 179 P2d 834, 840 (licensed contract hauler transported produce). Circumstances may, however, support a finding of an employment relationship. See *Williams v Stauffer Chem. Co.* (1956) 146 CA2d 322, 324, 304 P2d 141, 142 ("subhauler" was licensed and owned his truck but was subject to control). Further, a hauler operating under a public license or franchise remains liable for harm caused by the negligence of an independent contractor employed to do work for the hauler. See §4.60.

Vehicle drivers who pick up and deliver packages have been, given the specific terms under which they worked, viewed as independent contractors for tort liability purposes. See *Millsap v Federal Express Corp.* (1991) 227 CA3d 425, 277 CR 807. Recent cases applying traditional criteria to find such drivers to be employees, at least for other purposes, include *Air Couriers Int'l v Employment Dev. Dep't* (2007) 150 CA4th 923, 59 CR3d 37 (unemployment insurance), and *JHK Enters. Inc. v Department of Indus. Relations* (2006) 142 CA4th 1046, 48 CR3d 563 (need to insure for workers' compensation).

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Source: Torts/California Tort Guide/4 Automobiles/§4.50 (b) Salesmen; Retailers

§4.50 (b) Salesmen; Retailers

Salesmen on commission are usually employees because their employers retain a measure of control over assigned territories, techniques, required reports, methods of payment, and so forth. See *Burlingham v Gray* (1943) 22 C2d 87, 101, 137 P2d 9 (newspaper distributor); *Richards v Metropolitan Life Ins. Co.* (1941) 19 C2d 236, 239, 120 P2d 650 (life insurance agent); *Gipson v Davis Realty Co.* (1963) 215 CA2d 190, 203, 30 CR 253 (licensed real estate salesman); *Phillips v Larrabee* (1939) 32 CA2d 720, 727, 90 P2d 820 (sewing machine salesman); *Hiner v Olson* (1937) 23 CA2d 227, 231, 72 P2d 890 (traveling drug salesman). But see *Lee v Nanny* (1940) 38 CA2d 90, 94, 100 P2d 832 (traveling liquor salesman).

A retail dealer who sells products purchased from a producer is ordinarily an independent contractor. See *Alvarez v Felker Mfg. Co.* (1964) 230 CA2d 987, 998, 41 CR 514 (distributor resold product purchased from manufacturer); *Davis v Milligan* (1958) 166 CA2d 404, 408, 333 P2d 167 (gas station lessee).

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Source: Torts/California Tort Guide/4 Automobiles/§4.51 (4) Dual Employment; General and Special Employment

§4.51 (4) Dual Employment; General and Special Employment

A person may be the employee or agent of two or more independent employers at the same time, if the dual service is compatible. *Largey v Intrastate Radiotelephone, Inc.* (1982) 136 CA3d 660, 666, 186 CR 520; Restatement (Second) of Agency §226 (1958). Either or both can be held liable for the employee's wrongful conduct. *Hiner v Olson* (1937) 23 CA2d 227, 231, 72 P2d 890. See *Zamalloa v Hart* (9th Cir 1994) 31 F3d 911, 918 (more than one common carrier-lessee may be statutory employer of driver of leased truck under ICC regulations; see also chap 5).

An employee who is loaned or hired out by his general employer to a special employer, may be deemed the employee of both if each has some power of control. *Strait v Hale Constr. Co.* (1972) 26 CA3d 941, 943, 103 CR 487. See *McFarland v Voorheis-Trindle Co.* (1959) 52 C2d 698, 704, 343 P2d 923. See also Restatement §227.

A general employer that has relinquished all control of the employee to the special employer for a time is relieved of liability for the employee's conduct. See *Moss v Chronicle Publishing Co.* (1927) 201 C 610, 616, 258 P 88; *Dorosan v Haslett Warehouse Co.* (1958) 165 CA2d 599, 604, 332 P2d 422. However, a general employer is usually not considered to have relinquished all control if

- the employer continues to pay the employee's wages;
- the employer retains the sole right to discharge or substitute employees;
- the time of special employment is short; and
- the employee on loan is a skilled specialist.

See Restatement §227, comment c; *McComas v Al. G. Barnes Shows Co.* (1932) 215 C 685, 696, 12 P2d 630; *Billig v Southern Pac. Co.* (1922) 189 C 477, 485, 209 P 241; *Doty v Lacey* (1952) 114 CA2d 73, 78, 249 P2d 550.

When a general employer furnishes a vehicle to another, together with an employee/operator, the general employer is usually held to have continuing or sole responsibility for the employee's conduct. See *Mart v Riley* (1966) 239 CA2d 649, 653, 49 CR 6 (truck); *Doty v Lacey, supra* (crane). But see *Wessell v Barrett* (1944) 62 CA2d 374, 377, 144 P2d 656 (truck driver employed by teaming firm was special employee of contractor).

For more on dual employment, including the workers' compensation exclusivity immunity of both employers from damages liability to the injured employee, see California Workers' Damages Practice §§4.25-4.31 (2d ed Cal CEB 2001) with latest update.

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§4.52 (5) Partners and Joint Venturers

A partnership, or a joint venture, and each of its members are liable for wrongs committed in the course of business by a partner, venturer, or employee. Corp C §§16305, 16306; *Leming v Oilfields Trucking Co.* (1955) 44 C2d 343, 350, 282 P2d 23, 27 (joint venture); *Knight v Cook* (1963) 212 CA2d 613, 617, 28 CR 273, 275 (same); *Madsen v Cawthorne* (1938) 30 CA2d 124, 126, 85 P2d 909, 910 (partnership). See *Steuer v Phelps* (1974) 41 CA3d 468, 472, 116 CR 61 (unincorporated association). See also *Buckley v Chadwick* (1955) 45 C2d 183, 189, 289 P2d 242 (imputation of contributory negligence of other partner or partnership employee to heirs of deceased partner).

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§4.53 b. Scope of Employment

An employee (or agent) is acting within the scope of employment when he is engaged in transacting the employer's business or in activities for the benefit of the employer's enterprise. *Hinman v Westinghouse Elec. Co.* (1970) 2 C3d 956, 959, 88 CR 188; *Gipson v Davis Realty Co.* (1963) 215 CA2d 190, 209, 30 CR 253, 264. See generally Restatement (Second) of Agency §§228, 237 (1958).

An employee is not acting within the scope of employment while pursuing his own ends, *i.e.,* acting solely for his own personal convenience or for purposes exclusively his own. *Kish v California State Auto. Ass'n* (1922) 190 C 246, 248, 212 P 27, 28; *Baptist v Robinson* (2006) 143 CA4th 151, 49 CR3d 153 (winery not liable when bin borrowed by employee to transport his own grapes fell from his truck and injured motorcyclist; employer neither authorized nor ratified employee's use of its bin); *Tryer v Ojai Valley Sch. Dist.* (1992) 9 CA4th 1476, 1481, 12 CR2d 114; *Munyon v Ole's, Inc.* (1982) 136 CA3d 697, 703, 186 CR 424; *Harris v Oro-Dam Constructors* (1969) 269 CA2d 911, 916, 75 CR 544, 547. Being "on call" at all times does not place an employee who is engaged in a purely personal pursuit within the scope of employment. *Bailey v Filco, Inc.* (1996) 48 CA4th 1552, 56 CR2d 333 (employee's trip in own car to cookie shop while on paid break was substantial deviation; not within personal comfort and convenience exception); *Le Elder v Rice* (1994) 21 CA4th 1604, 1609, 26 CR2d 749. See Lab C §3600.3 (off-duty peace officers are within course of employment when doing officers' work). See also *Nationwide Mut. Ins. Co. v Liberatore* (9th Cir 2005) 408 F3d 1158 (active duty member of U.S. Navy had deviated from his duties—*i.e.,* was outside the scope of his employment—when involved in a car accident while on a gambling trip to Nevada).

An employer is not vicariously liable for an employee's willful, malicious, or criminal conduct that arises from a personal dispute, not from the conduct of the employer's business. *Kephart v Genuity, Inc.* (2006) 136 CA4th 280, 38 CR3d 845 (evidence that employee, enraged at other driver's conduct, forced him to roll over; exceptions to going and coming rule inapplicable).

In determining whether an employee was acting within the scope of his or her employment, workers' compensation "course of employment" cases can be helpful, but they are not controlling, because workers' compensation law involves different standards. See *Perez v Van Groningen & Sons* (1986) 41 C3d 962, 967 n2, 227 CR 106; *Hartline v Kaiser Found. Hosps*. (2005) 132 CA4th 458, 468, 33 CR3d 713 (workers' compensation's "premises line" rule did not benefit pedestrian hit by employee's car as it entered company parking lot); *Sunderland v Lockheed Martin Aero. Sys. Support Co.* (2005) 130 CA4th 1, 5, 29 CR3d 665 ("commercial traveler" rule not applicable in tort case). See also *Bussard v Minimed, Inc.* (2003) 105 CA4th 798, 129 CR2d 675 (person injured in collision with employee who was driving home after becoming ill at work, could sue employer under respondeat superior doctrine; going and coming rule did not preclude finding that employee was acting within scope of employment). For additional cases, see California Workers' Damages Practice §§2.7, 5.9 (2d ed Cal CEB 2001).

The plaintiff has the burden of proving that the employee was acting within the scope of the employment. *Ducey v Argo Sales Co.* (1979) 25 C3d 707, 721, 159 CR 835. Whether an employee was so acting when the accident occurred is usually a question of fact to be decided from all relevant circumstances. *Loper v Morrison* (1944) 23 C2d 600, 606, 145 P2d 1, 3. However, the court may decide the question as a matter of law if controlling facts are undisputed. *Perez v Van Groningen & Sons* (1986) 41 C3d 962, 969, 227 CR 106 (within scope of employment as a matter of law); *Bailey v Filco, Inc., supra* (outside scope of employment as a matter of law); *Le Elder v Rice, supra*; *Harris v Oro-Dam Constructors* (1969) 269 CA2d 911, 918, 75 CR 544, 549. See *Miller v American Greetings Corp.* (2008) 161 CA4th 1055, 74 CR3d 776 (evidence that driver made cell phone call to supervisor 9 minutes before his car struck pedestrian held insufficient to refute driver's testimony that he was on a personal errand on his day off, going to see his attorney).

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§4.54 (1) Inference From Ownership of Vehicle

The fact that the employer owned the vehicle the employee was driving gives rise to an inference sufficient to support a finding that the employee was acting within the scope of employment. *Meyer v Blackman* (1963) 59 C2d 668, 675, 31 CR 36, 41; *Shields v Oxnard Harbor Dist.* (1941) 46 CA2d 477, 487, 116 P2d 121, 128 (inference to be weighed with other evidence). See Restatement (Second) of Agency §229, comment d (1958). See also §4.45 (permissive use of defendant's vehicle does not in itself prove employment or agency status).

On the other hand, the fact that an employee was driving his own vehicle may have little bearing on whether he was within the scope of employment. *Johnson v Banducci* (1963) 212 CA2d 254, 263, 27 CR 764, 769; *Boynton v McKales* (1956) 139 CA2d 777, 790, 294 P2d 733, 741; *U.S. v Romitti* (9th Cir 1966) 363 F2d 662, 665. See Anno, 27 ALR5th 174 (1995) (employer's liability for negligence of employee in driving own car).

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Source: Torts/California Tort Guide/4 Automobiles/§4.55 (2) Deviation From Duty or Route; Disobedience of Employer's Rule or Instruction

§4.55 (2) Deviation From Duty or Route; Disobedience of Employer's Rule or Instruction

An employee's substantial deviation for personal reasons from the strict course of his duties or from the most direct route for their performance takes him outside the scope of employment. *Gordoy v Flaherty* (1937) 9 C2d 716, 717, 72 P2d 538, 539; *Le Elder v Rice* (1994) 21 CA4th 1604, 1608, 26 CR2d 749; *Loos v Boston Shoe Co.* (1954) 123 CA2d 564, 566, 266 P2d 884, 886. See Restatement (Second) of Agency §§234, 237 (1958).

An employee whose negligent driving while pursuing a personal objective causes injury can be outside the *scope of employment* for respondeat superior purposes even though within the *course of employment* under workers' compensation law. *Sunderland v Lockheed Martin Aero. Sys. Support Co.* (2005) 130 CA4th 1, 10, 29 CR3d 665 (commercial traveler rule not applied to impose liability on employer for injury caused by employee who rear-ended car in line at fast food restaurant). See §4.53.

An employee otherwise within the scope of employment, however, does not go outside it merely by

- combining a pursuit of private ends with pursuit of the employer's business (*Perez v Van Groningen & Sons* (1986) 41 C3d 962, 970, 227 CR 106; *Loper v Morrison* (1944) 23 C2d 600, 606, 145 P2d 1, 4; *Miller v Stouffer* (1992) 9 CA4th 70, 78, 11 CR2d 454; Restatement §236), or
- acting for his own comfort, convenience, or welfare while on the job (*DeMirjian v Ideal Heating Corp.* (1954) 129 CA2d 758, 765, 278 P2d 114, 118).

Even an action that violates a rule or an instruction of the employer may be within the scope of employment. *Perez v Van Groningen & Sons* (1986) 41 C3d 962, 969, 227 CR 106 (unauthorized rider on tractor); *Meyer v Blackman* (1963) 59 C2d 668, 676, 31 CR 36, 43 (employee picked up rider); *Foss v Anthony Indus.* (1983) 139 CA3d 794, 801, 189 CR 31 (employee instructed not to drive employer's truck); *DeMirjian v Ideal Heating Corp., supra*.

It is usually a question of fact whether the employee departed so completely from his employer's business as to be outside the scope of employment. *Loper v Morrison, supra*. See *Perez v Van Groningen & Sons, supra* (employee acting within scope of employment as matter of law). An issue of fact may also be presented on whether the deviation had ended and the employment functions resumed. *Meyer v Blackman, supra*.

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§4.56 (3) Going to and Coming From Place of Employment

Under the going and coming rule, employees driving to or from work are usually outside the scope of employment and the employer is not liable for their torts. *Ducey v Argo Sales Co.* (1979) 25 C3d 707, 722, 159 CR 835 (noting exceptions to rule); *Hinman v Westinghouse Elec. Co.* (1970) 2 C3d 956, 961, 88 CR 188 (noting exceptions); *DePew v Crocodile Enters., Inc.* (1998) 63 CA4th 480, 73 CR2d 673 (fact that dozing driver had been required to work long shift before driving home did not raise special risk exception to rule); *Tryer v Ojai Valley Sch. Dist.* (1992) 9 CA4th 1476, 1481, 12 CR2d 114; *Harris v Oro-Dam Constructors* (1969) 269 CA2d 911, 912, 75 CR 544 (applying rule).

The rule does not apply when the employee's driving to and from work is incidentally beneficial to his employer in a manner not common to ordinary commute trips. See *Miller v Stouffer* (1992) 9 CA4th 70, 80, 11 CR2d 454 (housekeeper driving employer's automobile to shop for groceries). Similarly, the rule does not exonerate an employer from liability for injury caused to another by an employee driving home from work early after becoming ill from workplace exposure to pesticide fumes. *Bussard v Minimed, Inc.* (2003) 105 CA4th 798, 129 CR2d 675.

If an employee must use his personal vehicle to carry out employment duties, his accidents while driving to and from a place of employment are business risks for which the employer can be vicariously liable. *Largey v Intrastate Radiotelephone, Inc.* (1982) 136 CA3d 660, 670, 186 CR 520; *Huntsinger v Glass Containers Corp.* (1972) 22 CA3d 803, 810, 99 CR 666 (employee who used personal vehicle during day to call on customers caused injuries while driving directly home from office at end of day). But see *State Lottery Comm'n v WCAB* (1996) 50 CA4th 311, 57 CR2d 745 (worker who fell while walking from house to car not entitled to workers' compensation).

The going and coming rule relates to employment at a particular place. *Robinson v George* (1940) 16 C2d 238, 245, 105 P2d 914. Therefore, it generally does not apply if the employee regularly leaves from home to make calls or perform duties in the field. *Richards v Metropolitan Life Ins. Co.* (1941) 19 C2d 236, 241, 120 P2d 650 (outside salesman driving from home to office for morning meeting); *Curcic v Nelson Display Co.* (1937) 19 CA2d 46, 52, 64 P2d 1153, 1157 (outside worker driving to manager's house in evening to report on day's work). But see *Tryer v Ojai Valley Sch. Dist., supra* (going and coming rule applied when driver worked at two different locations for two different work shifts, and accident occurred while driving to one such site after intervening personal break).

NOTE: The going and coming rule has been applied in many workers' compensation cases to decide whether an injury arose out of and in the course of employment, entitling the injured person to workers' compensation benefits. Such cases are sometimes cited in respondeat superior cases even though the concept "scope of employment" differs in some ways from "course of the employment." See *Perez v Van Groningen & Sons* (1986) 41 C3d 962, 967, 227 CR 106; *Ducey v Argo Sales Co., supra*; *Hinman v Westinghouse Elec. Co.* (1970) 2 C3d 956, 962 n3, 88 CR 188; *Saala v McFarland* (1965) 63 C2d 124, 45 CR 144; *Tryer v Ojai Valley Sch. Dist.* (1992) 9 CA4th 1476, 1482, 12 CR2d 114. But see *Church v Arko* (1977) 75 CA3d 291, 142 CR 92. For workers' compensation going and coming cases, see California Workers' Compensation Practice §§2.46-2.50A (4th ed Cal CEB 2000).

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Source: Torts/California Tort Guide/4 Automobiles/§4.57 (4) Special Errands; Social Functions

§4.57 (4) Special Errands; Social Functions

An employee is within the scope of employment—not merely going or coming—when on a special errand or mission as part of his regular duties or at the employer's request or order. *Jeewarat v Warner Bros. Entertainment Inc.* (2009) 177 CA4th 427, 98 CR3d 837 (company vice-president driving from airport to home after returning from out-of-state was still on special errand); *Largey v Intrastate Radiotelephone, Inc.* (1982) 136 CA3d 660, 669, 186 CR 520 (managerial employee called in for consultation); *Harvey v D & L Constr. Co.* (1967) 251 CA2d 48, 51, 59 CR 255 (driving fellow employee home from remote jobsite); *Trejo v Maciel* (1966) 239 CA2d 487, 495, 48 CR 765 (delivering supplies from one store to another).

An employer may be liable under the special errand principle for injuries caused by an employee going to or coming from a social function conducted by the employer if the employee was requested or expected to attend and there was a benefit to the employer. *Boynton v McKales* (1956) 139 CA2d 777, 789, 294 P2d 733 (banquet to honor employees). If attendance was neither requested nor expected, attending is outside the scope of employment. *Blackman v Great Am. First Sav. Bank* (1991) 233 CA3d 598, 602, 284 CR 491 (attending employer-assisted university course not mandatory). See *Harris v Trojan Fireworks Co.* (1984) 155 CA3d 830, 836, 202 CR 440 (informal Christmas lunch); *Munyon v Ole's, Inc.* (1982) 136 CA3d 697, 704, 186 CR 424 (off-duty store employee came in to pick up paycheck); *Robbins v Hewlett-Packard Corp.* (1972) 26 CA3d 489, 495, 103 CR 184 (company picnic); *Flynn v Ralph M. Parsons Co.* (1966) 241 CA2d 181, 184, 50 CR 260, 262 (Christmas party); *Vivion v National Cash Register Co.* (1962) 200 CA2d 597, 606, 19 CR 602, 607 (night work unsolicited by employer).

On an employer's liability for injury resulting from alcohol provided at the employer's premises, see §4.58.

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2. Employer's Personal Negligence

§4.58 a. Entrusting Vehicle to Unfit Driver

Separate from vicarious liability under respondeat superior, an employer may be liable for personal negligence in knowingly entrusting a vehicle to an employee who is unfit to drive. *Syah v Johnson* (1966) 247 CA2d 534, 538, 55 CR 741, 744 (delivery man known to have dizzy spells). See *Shifflette v Walkup Drayage & Warehouse Co.* (1946) 74 CA2d 903, 907, 169 P2d 996, 998 (unlicensed employee with impaired vision). See also Veh C §§14606-14607 (unlawful to employ unlicensed driver). See also §4.38 (owner's liability for negligent entrustment of vehicle). For a jury instruction on negligent entrustment, see CACI 724 (2003).

An employer that admits respondeat superior liability for an employee's acts may obtain dismissal of a separately-stated cause of action for negligent entrustment. *Jeld-Wen, Inc. v Superior Court (Keener)* (2005) 131 CA4th 853, 32 CR3d 351 (dismissal of negligent entrustment theory precluded plaintiff from introducing evidence of employee's prior vehicle accidents). See *Armenta v Churchill* (1954) 42 C2d 448, 457, 267 P2d 303 (admission of respondeat superior liability during trial precluded evidence of drivers 37 traffic violations and manslaughter conviction).

NOTE: In *Jeld-Wen,* the court rejected any suggestion in *Syah v Johnson, supra,* that the evidence preclusion statements in *Armenta* were mere dictum. 131 CA4th at 865.

In special circumstances, the employer may be personally negligent in permitting an employee who drank liquor at a company party to drive the employee's own vehicle. See *Brockett v Kitchen Boyd Motor Co.* (1968) 264 CA2d 69, 74, 70 CR 136, 139 (minor employee). See Veh C §40001(a).

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Source: Torts/California Tort Guide/4 Automobiles/§4.59 b. Failing to Equip or Maintain Vehicle

§4.59 b. Failing to Equip or Maintain Vehicle

An employer may be held liable, as is an owner (see §4.39), for negligently failing to equip a vehicle in any of the following ways:

- As required by law (Veh C §40001(b); *Hernandez v Murphy* (1941) 46 CA2d 201, 209, 115 P2d 565, 569),
- As reasonably necessary for its safe operation (*Menchaca v Helms Bakeries, Inc.* (1968) 68 C2d 535, 540, 67 CR 775, 778), or
- As reasonably necessary for the safety of occupants (*Mortensen v Southern Pac. Co.* (1966) 245 CA2d 241, 244, 53 CR 851, 853 (no seatbelts in company car; see Veh C §27315(f)).

Similarly, the employer may be liable for negligently failing to maintain a vehicle in a safe condition. *Brandes v Rucker-Fuller Desk Co.* (1929) 102 CA 221, 227, 282 P 1009, 1012.

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3. Liability for Independent Contractors' Fault

§4.60 a. Public Franchise Rule; Carriers

The hirer of an independent contractor may be liable to a person injured by the contractor's fault under several exceptions to the general rule that such a hirer is not responsible. See Restatement (Second) of Torts §§410, 429 (1965). See generally §4.45 on respondeat superior liability for an employee's or agent's fault, §§4.46-4.52 on distinguishing employees from independent contractors, and §§6.9-6.12 on the rule and exceptions in construction site cases.

For example, a person who carries on an unreasonably dangerous activity under a franchise granted by a public authority is liable for the negligence of a contractor hired to do the work. Restatement §428. Thus, a franchised common carrier of goods is liable for a subhauler's negligence. *Eli v Murphy* (1952) 39 C2d 598, 599, 248 P2d 756, 757; *Gamboa v Conti Trucking, Inc.* (1993) 19 CA4th 663, 668, 23 CR2d 564 (verifying subhauler's insurance does not eliminate nondelegable duty); *Lehman v Robertson Truck-A-Way* (1953) 122 CA2d 82, 85, 264 P2d 653, 655. Similarly, an interstate motor carrier that undertakes an activity that can lawfully be carried out only under a public franchise or authority and that involves possible danger to the public is liable for harm caused by an independent contractor. *Serna v Pettey Leach Trucking, Inc.* (2003) 110 CA4th 1475, 2 CR3d 835 (liability even though cargo was exempt from certain economic regulations). But see *Castro v Budget Rent-a-Car Sys., Inc.* (2007) 154 CA4th 1162, 1168, 65 CR3d 430 (company that rented truck to business not "motor carrier" subject to California's nondelegable duty doctrine; foreign state law on permissive use exonerated company).

See Anno, 34 ALR2d 1121, 1122 (1954) (liability of lessor motor carrier for lessee's torts).

Legislation in 1996 deregulating the trucking industry appears to have eliminated distinctions previously drawn between "common" and "private" highway carriers, permitting a primary carrier to be held liable for injury caused by the negligence of a subhauler even if the latter is an independent contractor. Earlier cases held that a subhauler's negligence is not imputed to the hirer if

- the hirer is operating under a permit rather than a franchise (see *Gilbert v Rogers* (1953) 117 CA2d 712, 717, 256 P2d 574, 577) and
- the subhauler holds a valid comparable permit (see *Klein v Leatherman* (1969) 270 CA2d 792, 796, 76 CR 190, 192).

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§4.61 b. Contractor Hired to Do Dangerous Work

Under the peculiar risk doctrine, the hirer of an independent contractor to perform dangerous work must require the contractor to take special precautions, and the hirer may be liable for injuries to persons other than the contractor's employees caused by the hirer's or the contractor's failure to take such precautions. See Restatement (Second) of Torts §§413, 416 (1965). See §6.10 for more on the peculiar risk doctrine. See also *A. Teichert & Son v Superior Court* (1986) 179 CA3d 657, 662, 225 CR 10 (frequent truck traffic into defendant's plant did not create "special risk").

See Restatement §§427-427A on the liability of the hirer of an independent contractor to do inherently dangerous work.

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§4.62 c. Negligent Hiring

The hirer who does not use due care to engage an independent contractor who is competent to do the job may be liable for injuries to third persons resulting from the contractor's inadequate knowledge, skill, experience, or equipment. See Restatement (Second) of Torts §411, comment a (1965). See also *Risley v Lenwell* (1954) 129 CA2d 608, 622, 277 P2d 897, 908 (hauler with inadequate equipment).

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Source: Torts/California Tort Guide/4 Automobiles/§4.63 F. Persons Furnishing Alcoholic Beverages

§4.63 F. Persons Furnishing Alcoholic Beverages

NOTE: From 1971 through 1978, in a variety of situations, California law permitted a person injured through the fault of a driver who had drunk an alcoholic beverage to recover damages from the person who had furnished drinks to the driver. See *Vesely v Sager* (1971) 5 C3d 153, 164, 95 CR 623 (furnisher's duty of care could be based on Bus & P C §25602 prohibition against selling or furnishing alcoholic beverages to an obviously intoxicated person); *Bernhard v Harrah's Club* (1976) 16 C3d 313, 325, 128 CR 215 (recovery could also be based on modern negligence (nonstatutory) law); *Ewing v Cloverleaf Bowl* (1978) 20 C3d 389, 400, 143 CR 13 (injured drinker as well as a third person could sue for injury); *Coulter v Superior Court* (1978) 21 C3d 144, 152, 145 CR 534 (social host furnishing liquor also subject to liability). See also *Paula v Gagnon* (1978) 81 CA3d 680, 685, 146 CR 702 (social host); *Brockett v Kitchen Boyd Motor Co.* (1972) 24 CA3d 87, 100 CR 752 (liability for furnishing liquor to minor). See §10.2.

Business and Professions Code §25602(a) prohibits selling or furnishing alcoholic beverages "to any habitual or common drunkard or to any obviously intoxicated person," but Bus & P C §25602(b) provides that no person who sells or furnishes any alcoholic beverage "pursuant to subdivision (a)" shall be civilly liable to any person for injuries resulting from intoxication by the consumer. Business and Professions Code §25602(c) declares that §25602 shall be interpreted to abrogate the holdings in cases such as *Vesely v Sager, supra, Bernhard v Harrah's Club, supra,* and *Coulter v Superior Court, supra,* "in favor of prior judicial interpretation finding the consumption of alcoholic beverages rather than the serving of alcoholic beverages as the proximate cause of injuries inflicted upon another by an intoxicated person." (For the "prior judicial interpretation," see *Cole v Rush* (1955) 45 C2d 345, 289 P2d 450.) The subdivision (b) and (c) provisions were also added to CC §1714.

Business and Professions Code §25602.1 provides that, despite §25602(b), a cause of action may be brought against any liquor licensee who sells, furnishes, or gives any alcoholic beverage to an "obviously intoxicated minor," when that act is the proximate cause of injury or death sustained by any person. The §25602.1 exception to nonliability has been called "a narrow one that is construed strictly." See *Elizarraras v L.A. Private Sec. Servs.* (2003) 108 CA4th 237, 243, 133 CR2d 302 (security guards who did not serve alcohol to minors at party not liable for injury to them after they drove away). See also *Sakiyama v AMF Bowling Ctrs., Inc.* (2003) 110 CA4th 398, 1 CR3d 762, cited in §4.65 (owner of site at which all-night rave party was held not liable for possibly drug-related accident); *Hernandez v Modesto Portuguese Pentecost Ass'n* (1995) 40 CA4th 1274, 48 CR2d 229 (owner of ballroom rented out for dance not liable for injuries caused by minor drunk driver served beer by tenant).

NOTE: A person being prosecuted for the crime of furnishing alcohol to a minor may assert a reasonable mistake of fact of the person's age as a defense. *In re Jennings* (2004) 34 C4th 254, 280, 17 CR3d 645.

The 1978 amendments are constitutional even though they are "a patchwork of apparent inconsistencies and anomalies." *Cory v Shierloh* (1981) 29 C3d 430, 440, 174 CR 500. The changes are not retroactive in that they do not apply to causes of action that accrued before January 1, 1979. *Sagadin v Ripper* (1985) 175 CA3d 1141, 1155, 221 CR 675 (collecting cases).

The civil immunity provided in Bus & P C §25602 and CC §1714 has been applied to the following:

- Injury to the intoxicated consumer (as well as to third persons injured by the intoxicated driver) (*Cory v Shierloh* (1981) 29 C3d 430, 437, 174 CR 500); and
- Injury to an intoxicated minor (*Cory v Shierloh, supra*) and injuries to third persons caused by intoxicated minors (*Strang v Cabrol* (1984) 37 C3d 720, 725, 209 CR 347; *Bass v Pratt* (1986) 177 CA3d 129, 136, 222 CR 723; *Rogers v Alvas* (1984) 160 CA3d 997, 1003, 207 CR 60) unless the minor was obviously intoxicated when served (*Chalup v Aspen Mine Co.* (1985) 175 CA3d 973, 979, 221 CR 97; see Bus & P C §25602.1; *Schaffield v Abboud* (1993) 15 CA4th 1133, 1142, 19 CR2d 205, defining "obviously intoxicated").

The immunity is not avoided by alleging that the defendant was negligent in permitting the driver to drink on the premises. See *Leong v San Francisco Parking, Inc.* (1991) 235 CA3d 827, 832, 1 CR2d 41; *Debolt v Kragen Auto*

Supply (1986) 182 CA3d 269, 274, 227 CR 258; *Andre v Ingram* (1985) 164 CA3d 206, 211, 210 CR 150. But see *Williams v Saga Enters.* (1990) 225 CA3d 142, 274 CR 901 (liability recognized when tavern owner agreed to keep intoxicated patron's car keys to prevent him from driving).

It is not settled whether civil immunity applies when liquor is furnished to someone suffering from a mental or physical disability. See *Cantor v Anderson* (1981) 126 CA3d 124, 130, 178 CR 540 (no immunity for defendants who served alcohol to developmentally disabled persons; rejecting view that consuming, not serving, is proximate cause of injury caused by person unable to voluntarily resist consumption). *Strang v Cabrol* (1984) 37 C3d 720, 726, 209 CR 347, notes the *Cantor* decision and the definition of "ordinary man" in *Cole v Rush* (1955) 45 C2d 345, 289 P2d 450. The *Cantor* holding was rejected in *Cardinal v Santee Pita, Inc.* (1991) 234 CA3d 1676, 286 CR 275 (mentally disabled patron); *Hepe v Paknad* (1988) 199 CA3d 412, 418, 244 CR 823 (serving alcoholic); *Andre v Ingram, supra* (same). See *Bass v Pratt, supra* (youth alone is not an exceptional mental or physical condition).

The statutes do not preclude an owner's liability for negligently entrusting a vehicle to an intoxicated driver. *Blake v Moore* (1984) 162 CA3d 700, 704, 208 CR 703; see §4.38.

See Anno, 54 ALR5th 313 (1997) (social host's liability).

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§4.64 G. Service Stations, Shops, and Repairers

A service station or shop that undertakes to inspect and service a motor vehicle is liable for injuries that result from failure to use reasonable care in conducting inspection and service. See *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 546, 138 CR 705 (dealer servicing 4-year-old car liable for failing to replace brake fluid; dealer knew that original fluid in that make deteriorated in use), disapproved on other grounds at 8 C4th 574.

Similarly, a person who undertakes to maintain or repair a vehicle is liable for failure to use ordinary skill and care in that maintenance or repair. *Jackson v Ryder Truck Rental, Inc.* (1993) 16 CA4th 1830, 1840, 20 CR2d 913 (truck servicing company contracted to maintain vehicles of decedent's employer; driver was struck by another vehicle while standing on shoulder after truck's electrical system failed). Expert testimony that brake failure was due to a service department's failure to close "bleeder valves" was properly rejected as speculative when the expert failed to address evidence that there had been no loss of brake fluid. *Nardizzi v Harbor Chrysler Plymouth Sales, Inc.* (2006) 136 CA4th 1409, 39 CR3d 530.

Although the liability can be imposed on a tire service center for failing to tell a customer that tread depth on a tire is less than the 1/32 inch mentioned in Veh C §§27465, 27501, such failure does not mandate an instruction on presumption of negligence (see §§1.31-1.34). See *Alcala v Vazmar Corp.* (2008) 167 CA4th 747, 84 CR3d 402 (absent negligence per se instruction, jury found no negligence, but defense judgment reversed for erroneous refusal to admit relevant evidence).

There are situations in which a repairer can be strictly liable for injuries caused by a defective (*i.e.,* faulty or incomplete) repair. See §11.29.

See Anno, 60 ALR5th 379 (1998) (self-service filling station operator's liability for patron's injury).

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Source: Torts/California Tort Guide/4 Automobiles/§4.65 H. Law Enforcement Officers; Other Persons

§4.65 H. Law Enforcement Officers; Other Persons

A law enforcement officer can be liable for negligent exercise of authority that exposes a vehicle's occupants to an unreasonable risk of harm. *Lugtu v California Highway Patrol* (2001) 26 C4th 703, 707, 110 CR2d 528 (question of fact whether conduct of CHP motorcycle officer, who signaled speeding driver to pull over onto median strip where car was hit by another vehicle, was legal cause of passengers' injuries). But see *Minch v California Highway Patrol* (2006) 140 CA4th 895, 44 CR3d 846 (CHP officers owed no duty of care to tow truck driver they had called to scene after he had pulled car from ditch and was hit by passing car while getting forms from cab of tow truck). See generally §8.13.

Courts have refused, however, to impose liability on such persons as the following:

- Property owners' association and security firm it employed when association member drove while intoxicated (*Titus v Canyon Lake Prop. Owners Ass'n* (2004) 118 CA4th 906, 13 CR3d 807, also noted in §10.7),
- The owner of a site at which an all-night rave party was held, even if drugs were being sold and used at the party (*Sakiyama v AMF Bowling Ctrs., Inc.* (2003) 110 CA4th 398, 1 CR3d 762),
- An insurance broker and the assigned risk plan for enabling an allegedly incompetent person to retain a driver's license (*Nipper v California Auto Assigned Risk Plan* (1977) 19 C3d 35, 136 CR 854),
- A legal owner for the negligence of an independent contractor who was repossessing the car (*Campbell v Security Pac. Nat'l Bank* (1976) 62 CA3d 379, 133 CR 77),
- A lender that had financed purchase of the car by an uninsured and allegedly incompetent driver (*Altman v Morris Plan Co.* (1976) 58 CA3d 951, 130 CR 397; *Drake v Morris Plan Co.* (1975) 53 CA3d 208, 125 CR 667),
- A driver unable to comply with the financial responsibility laws (*Skerlec v Wells Fargo Bank* (1971) 18 CA3d 1003, 96 CR 434), and
- A utility company for the condition of an inoperable streetlight near the intersection where the collision occurred (*White v Southern Cal. Edison Co.* (1994) 25 CA4th 442, 30 CR2d 431).

Special facts may allow the imposition of liability on persons unconnected with the operation, ownership, or condition of the vehicle that causes injury. See, *e.g., Weirum v RKO Gen., Inc.* (1975) 15 C3d 40, 123 CR 468 (radio station liable for holding contest that led to unsafe driving by would-be contestant); *Bloomberg v Interinsurance Exch.* (1984) 162 CA3d 571, 207 CR 853 (towing service that failed to locate stalled vehicle liable to persons injured by drunk driver while waiting for tow). See also *Doggett v U.S.* (9th Cir 1988) 875 F2d 684, 689 (government's liability under Federal Tort Claims Act for allowing drunken sailor to drive off base). But see *Bryant v Glastetter* (1995) 32 CA4th 770, 38 CR2d 291 (drunk driver stopped by police not liable to tow truck driver who was struck by another vehicle).

See Annos, 3 ALR5th 1 (1992) (imputing driver's negligence to passenger on joint venture theory), 64 ALR4th 272 (1988) (passenger's liability for injury caused by intoxicated driver).

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III. DEFENSES: INJURED PERSON'S FAULT

§4.66 A. Contributory Negligence

Under the comparative fault system adopted in 1975 (see §1.41), the injured person's contributory fault proportionally reduces his or her damages judgment. *Li v Yellow Cab Co.* (1975) 13 C3d 804, 829, 119 CR 858.

NOTE: Although many of the cases cited in §§4.66-4.80 were decided when contributory negligence was a complete bar to recovery, the principles stated apply to contributory negligence as a partial defense under *Li v Yellow Cab Co., supra*. See *Sagadin v Ripper* (1985) 175 CA3d 1141, 1168, 221 CR 675 (comparative negligence rules apply despite defendant's violation of statute in furnishing liquor to minor plaintiff); *Wittenbach v Ryan* (1976) 63 CA3d 712, 718, 134 CR 47 (*Li* changed effect of contributory negligence, not concept).

The defendant has the burden of proving contributory negligence, and the burden must be met by more than conjecture or speculation. *La Manna v Stewart* (1975) 13 C3d 413, 427, 118 CR 761. Like a defendant driver (see §4.6), a plaintiff who is exercising due care is entitled to assume that other drivers will obey the law and use ordinary care. *Simmons v Wexler* (1979) 94 CA3d 1007, 1013, 156 CR 810 (right to assume slowing vehicle would stop at stop sign; also no evidence that plaintiff's failure to use motorcycle headlight during daytime contributed to accident). Conversely, a plaintiff cannot rely on that assumption after notice or knowledge that the other person is not obeying the law or using due care. *Hargrave v Winquist* (1982) 134 CA3d 916, 927, 185 CR 30 (failure to apply brakes promptly on seeing defendants' out-of-control car).

See Anno, 69 ALR5th 625 (1999) (comparative negligence of driver as defense to enhanced injury, crashworthiness, or second collision claim).

On whether failing to use an available seatbelt is contributory negligence, see §4.71.

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1. Riders

§4.67 a. Failing to Observe and Warn of Danger

Although a motor vehicle passenger or guest must exercise ordinary care for his own safety and may not blindly rely on the driver (*Pobor v Western Pac. R.R.* (1961) 55 C2d 314, 324, 11 CR 106, 111), the rider's mere failure to observe traffic conditions is not ordinarily contributory negligence. *Robinson v Cable* (1961) 55 C2d 425, 427, 11 CR 377, 378; *Casey v Russell* (1982) 138 CA3d 379, 386, 188 CR 18; *Hooper v Romero* (1968) 262 CA2d 574, 581, 68 CR 749, 754; *Van Pelt v Carte* (1962) 209 CA2d 764, 770, 26 CR 182, 185. Even if the rider saw a danger, his failure to warn the driver is not negligence unless he had time to do so. *Johnson v Duvall* (1963) 215 CA2d 122, 126, 30 CR 106, 109; *Gadbury v Ray* (1959) 171 CA2d 150, 155, 340 P2d 66, 69. See *Marquis v St. Louis-San Francisco Ry.* (1965) 234 CA2d 335, 351, 44 CR 367, 376 (belated warning).

However, a rider may not shut his eyes to obvious danger and blindly rely on the driver when approaching a place of danger such as a railroad crossing. See *Pobor v Western Pac. R.R., supra*; *Travis v Southern Pac. Co.* (1962) 210 CA2d 410, 435, 26 CR 700, 714; *Miller v Western Pac. R.R.* (1962) 207 CA2d 581, 591, 24 CR 785, 793. See also *Spataro v Southern Pac. Co.* (1967) 254 CA2d 778, 780, 62 CR 621, 623 (co-worker's negligent failure to look barred his recovery, but not driver's).

A rider who knows that the driver is inexperienced must use greater than ordinary attention and vigilance. *Riddick v Jim Hay Co.* (1975) 45 CA3d 464, 119 CR 546 (rider failed to warn unlicensable driver that headlights were off).

The burden of proving a rider's contributory negligence is on the defendant, and the issue should be submitted to the jury only if there is evidence that would permit a legitimate inference of it. *Casey v Russell, supra*; *Van Pelt v Carte, supra*; *Gadbury v Ray, supra*.

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§4.68 b. Interfering With Driver

A rider's participation in, or interference with, the operation of the vehicle may constitute contributory negligence. Veh C §21701. See *Turner v Mannon* (1965) 236 CA2d 134, 141, 45 CR 831, 835 (strident exclamation caused driver to turn too sharply); *Reclusado v Mangum* (1964) 228 CA2d 8, 15, 39 CR 157, 162 (back-seat passenger put baby next to driver, who lost control).

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Source: Torts/California Tort Guide/4 Automobiles/§4.69 c. Riding in Unsafe Vehicle or With Unfit Driver

§4.69 c. Riding in Unsafe Vehicle or With Unfit Driver

It may be contributory negligence to knowingly ride

- in a disabled or defective vehicle (*Rodriquez v Lompoc Truck Co.* (1964) 227 CA2d 769, 775, 39 CR 117, 121 (flat tire); *Linde v Emmick* (1936) 16 CA2d 676, 683, 61 P2d 338, 341 (no lights)),
- with an intoxicated driver (*Taylor v Rosiak* (1965) 236 CA2d 68, 78, 45 CR 759, 765; see §4.80 on plaintiff's willful misconduct; see Anno, 5 ALR4th 1194 (1981) (admissibility of evidence of passenger's blood alcohol level on issue of contributory fault)),
- with a reckless driver (*Travis v Southern Pac. Co.* (1962) 210 CA2d 410, 423, 26 CR 700, 706), or
- with a sleepy driver (*Hayes v Harry* (1960) 183 CA2d 412, 418, 6 CR 671, 674; see Anno, 1 ALR4th 556 (1980) (passenger's contributory fault when accident was due to driver's drowsiness, physical handicap, or illness)).

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Source: Torts/California Tort Guide/4 Automobiles/§4.70 d. Imputed Driver's Negligence

§4.70 d. Imputed Driver's Negligence

A driver's negligence is not generally imputed to a rider (*Sozzi v Gull* (1963) 218 CA2d 231, 234, 32 CR 221, 223), even a rider who owns the vehicle, unless the vehicle is being operated for the rider's benefit and under his control and the driver is therefore his agent or employee. *Glanville v Cannick* (1960) 182 CA2d 514, 517, 6 CR 175, 177 (owner asked guest to drive to football game); *Cope v Goble* (1940) 39 CA2d 448, 455, 103 P2d 598, 602 (bailee of car asked father-in-law to drive him to see prospective employer). See Anno, 21 ALR4th 459 (1983) (effect of injured passenger's status as owner).

Similarly, the driver's negligence is not imputed to an owner suing a third party for damage to the vehicle. *Hertz Corp. v Pippin* (1974) 38 CA3d 796, 799, 113 CR 698. See *Johnson v Peterson* (1974) 38 CA3d 619, 624 n5, 113 CR 445 (dictum).

The driver's negligence may be imputed to the rider on the basis of joint venture only if the rider has a right of control over the operation of the vehicle; it is not enough that the parties have a common plan, purpose, or destination. *Edwards v Freeman* (1949) 34 C2d 589, 592, 212 P2d 883, 884; *Campagna v Market St. Ry.* (1944) 24 C2d 304, 307, 149 P2d 281, 283; *Jones v Reith* (1958) 166 CA2d 220, 226, 333 P2d 226, 232; *Roberts v Craig* (1954) 124 CA2d 202, 208, 268 P2d 500, 504.

Contributory negligence of the driver is not imputed to the rider even in the following situations:

- The trip is for the benefit of someone other than the owner or bailee (*Flores v Brown* (1952) 39 C2d 622, 628, 248 P2d 922, 925; *Edwards v Freeman* (1949) 34 C2d 589, 594, 212 P2d 883, 885),
- The parties are co-employees (*Singleton v Bonnesen* (1955) 131 CA2d 327, 329, 280 P2d 481, 483 (sheriff and deputy); *Been v Lummus Co.* (1946) 76 CA2d 288, 294, 173 P2d 34, 37 (refinery workers); *Handley v Lombardi* (1932) 122 CA 22, 28, 9 P2d 867, 870 (warehouse superintendent and truck driver)), or
- A family relationship exists between them (Fam C §783 (injuries to married person by third party); *Hooper v Romero* (1968) 262 CA2d 574, 579, 68 CR 749, 753 (husband and wife); *Marquis v St. Louis-San Francisco Ry.* (1965) 234 CA2d 335, 351, 44 CR 367, 376 (same); *Thompson v Keckler* (1964) 228 CA2d 199, 215, 39 CR 267, 277 (mother and daughter)).

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§4.71 e. Failing to Use Seatbelt

California's mandatory seatbelt law, Veh C §27315, requires both drivers and passengers to use seatbelts and the driver not to operate a vehicle until each passenger 16 years or over is properly restrained by a safety belt. Other statutes require the installation and use of child restraints and of seatbelts in particular vehicles.

It is unsettled, however, whether a driver's or a passenger's failure to use an available seatbelt constitutes contributory negligence that proportionally reduces damages. Vehicle Code §27315(i) provides that

> [i]n a civil action, a violation of [these provisions] does not establish negligence as a matter or law or negligence per se for comparative fault purposes, but negligence may be proven as a fact without regard to the violation.

The court in *Housley v Godinez* (1992) 4 CA4th 737, 747, 6 CR2d 111, upholds a jury instruction that allowed the jury "to decide what weight, if any, to give [Veh C §27315] in determining the standard of reasonable care," concluding that the provision was intended only to preclude the automatic and invariable reduction of awards to plaintiffs injured while not wearing a seatbelt. By contrast, the court in *Franklin v Gibson* (1982) 138 CA3d 340, 342, 188 CR 23, rejected a jury instruction that allowed the jury to proportionally reduce a plaintiff's damages for failure to wear a seatbelt in the absence of expert or other evidence of what injurious consequences would have been avoided by its use. *Franklin* concludes that the burden is on the defendant to prove that ordinary care in the circumstances required the plaintiffs to use the available seatbelts and, ordinarily by expert testimony, what injuries plaintiffs would have sustained had the seatbelts been used. See also *Hardison v Bushnell* (1993) 18 CA4th 22, 28, 22 CR2d 106 (plaintiff's failure to use seatbelt was not supervening cause absolving defendant); *McNeil v Yellow Cab Co.* (1978) 85 CA3d 116, 118, 119 n2, 147 CR 733 (circumstances of accident may lessen need for expert testimony; collision threw plaintiff from rear seat of taxicab into front); *Truman v Vargas* (1969) 275 CA2d 976, 982, 80 CR 373.

NOTE: Although it may violate no law for a long-distance truck driver, sleeping in an on-board berth while another drove, not to have put on an available restraint, a jury can be instructed that failure to wear the restraint was contributory negligence. See *Lara v Nevitt* (2004) 123 CA4th 454, 19 CR3d 865.

Most jurisdictions have rejected a "seatbelt defense," supporting the view that failure to use a seatbelt is not negligence by citing the basic tort principle (see §§4.6, 4.66) that it is not negligence to rely on an assumption that one will not be injured by another's negligent conduct absent reasonable notice that such negligence is occurring or is likely to occur. See *Franklin v Gibson* (1982) 138 CA3d 340, 344, 188 CR 23. See Annos, 62 ALR5th 537 (1998) (reducing damages for nonuse of seatbelt), 46 ALR5th 557 (1997) (failure to use, or misuse of, child safety seat or restraint system), 95 ALR3d 239 (1979) (nonuse of seatbelt as evidence of comparative negligence), 92 ALR3d 9 (1979) (nonuse as contributory negligence), 80 ALR3d 1033 (1977) (nonuse as failure to mitigate damages). See also *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 538, 34 CR2d 630 ("we all realize that driving is a risky activity, and that we may be injured by the negligence of another driver, but we do not assume the risk of another's negligence when we choose to drive").

On the duty of an owner or a seller to equip a vehicle with seatbelts, see Veh C §27314 (dealer's duty to install); *Krawitz v Rusch* (1989) 209 CA3d 957, 257 CR 610 (private seller of automobile had no duty to install seatbelts or warn of their lack); *Twohig v Briner* (1985) 168 CA3d 1102, 1108, 214 CR 729 (liability of owner to injured passenger for removal of seatbelts). See also *General Motors Corp. v Superior Court* (1996) 48 CA4th 580, 55 CR2d 871 (statute of limitations in suit against seatbelt manufacturer). See generally chap 11 (Product Liability) and §11.41 on the statute of limitations in product liability cases.

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2. Pedestrians

§4.72 a. Duties Generally

Statutes regulating pedestrian and vehicle traffic provide for right-of-way rules, the overriding duty of due care, and prohibitions against walking or crossing in specified places. Veh C §§21451-21456.1 (traffic signals), 21950-21960. Local authorities may also prohibit crossing outside crosswalks. Veh C §21961. See *Sehgal v Knight* (1967) 253 CA2d 170, 173, 61 CR 118, 120.

A pedestrian crossing in a normal manner in a crosswalk is ordinarily entitled to assume that drivers will yield and is not chargeable with contributory negligence in failing to anticipate the contrary. *La Manna v Stewart* (1975) 13 C3d 413, 428, 118 CR 761 (pedestrian need not always be looking in direction of oncoming traffic); *Schmitt v Henderson* (1969) 1 C3d 460, 464, 82 CR 502; *Novak v Dewar* (1961) 55 C2d 749, 752, 13 CR 101, 103; *Gray v Brinkerhoff* (1953) 41 C2d 180, 185, 258 P2d 834, 837.

That a pedestrian was struck in a crosswalk does not inevitably establish freedom from negligence, however, because the pedestrian

- must use ordinary care in looking for traffic (*Williams v Goodman* (1963) 214 CA2d 856, 863, 29 CR 877, 881 (looked in only one direction); *Flores v McCoy* (1960) 186 CA2d 502, 9 CR 349, 352 (failed to see car only 18 feet away));
- must give motorists a reasonable opportunity to yield (*Parsekyan v Thompson* (1962) 208 CA2d 848, 850, 25 CR 691, 692 (pedestrian reversed course); *Butler v Malis* (1962) 207 CA2d 38, 40, 24 CR 407, 409 (pedestrian ran into traffic); see *Myers v Carini* (1968) 262 CA2d 614, 619, 68 CR 800, 803); and
- may have waived his right-of-way (*Cohen v Bay Area Pie Co.* (1963) 217 CA2d 69, 72, 31 CR 426, 427).

A pedestrian outside a crosswalk must use greater care. *Hine v Carmichael* (1962) 205 CA2d 663, 667, 23 CR 331, 333. See Veh C §21954 (pedestrian to yield right-of-way to vehicles "so near as to constitute an immediate hazard"). In most cases, the essential question is whether the requisite care was used, not merely whether the pedestrian yielded the right-of-way. *Watkins v Nutting* (1941) 17 C2d 490, 495, 110 P2d 384, 387 (pedestrian stepped into traffic from behind stopped car); *Biggar v Carney* (1960) 181 CA2d 22, 28, 5 CR 94, 98 (pedestrian crossed between crosswalks). See also *Wittenbach v Ryan* (1976) 63 CA3d 712, 717, 134 CR 47 (pedestrian in parking lot could not assume she had right-of-way). Because a driver is not relieved of the duty to exercise due care for the safety of any pedestrian on the roadway (Veh C §21954(b)), a factual issue of proximate cause may also be presented. See *Bove v Beckman* (1965) 236 CA2d 555, 562, 46 CR 164, 167.

The pedestrian has a duty to look for traffic at the times and places an ordinarily prudent person would. *Francis v City & County of San Francisco* (1955) 44 C2d 335, 339, 282 P2d 496, 499 (crosswalk at intersection controlled by traffic officer); *Wooldridge v Mounts* (1962) 199 CA2d 620, 625, 18 CR 806, 809 (standing in street). See *Schmitt v Henderson, supra* (no duty to look behind).

Whether a pedestrian who took some precautions used ordinary care is a question of fact. *Watkins v Nutting, supra* (looked both ways); *Bove v Beckman* (1965) 236 CA2d 555, 563, 46 CR 164, 168 (stopped to wait for passing traffic); *Biggar v Carney, supra* (looked both ways); see *Fosgate v Gonzales* (1980) 107 CA3d 951, 956, 166 CR 233 (intoxicated pedestrian is not necessarily barred from recovery as a matter of law; see §4.80 on plaintiff's willful misconduct).

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§4.73 b. Minors

A child under age 5 is considered incapable of negligence. *Casas v Maulhardt Buick, Inc.* (1968) 258 CA2d 692, 700, 66 CR 44, 49 (4-year-old crawled into street); *Morningred v Golden State Co.* (1961) 196 CA2d 130, 137, 16 CR 219, 224 (4-year-old on tricycle); *Christian v Goodwin* (1961) 188 CA2d 650, 655, 10 CR 507, 509 (4-year-old dashed into street without looking).

An older minor pedestrian, unlike a minor driver, is not held to adult standards, but is required to exercise only the degree of care that is expected of children of his age, experience, and intelligence. *Daun v Truax* (1961) 56 C2d 647, 652, 16 CR 351, 355 (5-year-old ran into traffic); *Cummings v County of Los Angeles* (1961) 56 C2d 258, 263, 14 CR 668, 671 (7-year-old ran in front of truck); *Jones v Wray* (1959) 169 CA2d 372, 376, 337 P2d 226, 228 (5-year-old ran into car).

A minor may rebut the presumption of negligence that arises from violation of a statute (see §4.10) by establishing that he used the care ordinarily used by persons of his maturity, intelligence, and capacity in similar circumstances. Evid C §669(b)(2).

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§4.74 3. Workers on Roadway

A person working on a public street is not expected to watch constantly for traffic, and is not necessarily negligent in failing to do so. *Gibson v State* (1962) 208 CA2d 458, 463, 25 CR 284, 286 (dump truck crossing highway to construction site); *Woods v Wisdom* (1933) 133 CA 694, 696, 24 P2d 863, 864 (construction worker at edge of pavement); *State Compensation Ins. Fund v Scamell* (1925) 73 CA 285, 290, 238 P 780, 781 (street sweeper).

This principle is not limited to people whose duties relate directly to the roadway itself. *Scott v City & County of San Francisco* (1949) 91 CA2d 887, 889, 206 P2d 45, 47 (roofer tending tar kettle in street). But the relaxed duty of vigilance does not apply to the following:

- A person working in the roadway for personal convenience (*Jacobs v Bozzani Motors, Ltd.* (1952) 109 CA2d 681, 684, 241 P2d 642, 644 (plumber cutting pipe in street); *Milton v Los Angeles Motor Coach Co.* (1942) 53 CA2d 566, 573, 128 P2d 178, 181 (photographer taking picture from street); *Carlsen v Diehl* (1922) 57 CA 731, 736, 208 P 150, 152 (worker loading truck at busy ferry entrance)), or
- A worker who suddenly moves in front of an approaching vehicle (*Lewis v Southern Cal. Edison Co.* (1931) 116 CA 44, 54, 2 P2d 419, 423).

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4. Avoiding Application of Contributory Negligence

§4.75 a. Rescue Doctrine

The Supreme Court's restatement and application of the rescue doctrine in *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 537, 34 CR2d 630 (see §1.44), suggests that the doctrine was not changed by the court's 1975 adoption of the comparative fault system (see §1.41).

Under the rescue doctrine, a person who goes to rescue or protect others in danger, and who takes reasonably necessary steps and does not act with unwarranted recklessness, is not contributorily negligent for voluntarily leaving a place of safety and incurring risks. *Bilyeu v Standard Freight Lines* (1960) 182 CA2d 536, 545, 6 CR 65, 70 (highway patrolman attempted to remove obstruction from highway); *Petersen v Lang Transp. Co.* (1939) 32 CA2d 462, 467, 90 P2d 94, 97 (bystander stood in highway to direct traffic away from accident). See Annos, 75 ALR4th 875 (1990) (rescue doctrine: application of comparative negligence principles, 73 ALR4th 737 (1989) (liability to rescuer of person causing vehicle accident), 4 ALR3d 558 (1965) (suit by rescuer against rescued person).

A rescuer's conduct did not bar recovery under the former rule of contributory negligence unless it amounted to a recklessness or rashness unwarranted by the actual or apparent circumstances. *Scott v Texaco, Inc.* (1966) 239 CA2d 431, 434, 48 CR 785, 787; *Petersen v Lang Transp. Co., supra*; *McClure v Southern Pac. Co.* (1919)41 CA 652, 656, 183 P 248, 249 (standing on railroad tracks helping another person away from oncoming train).

The rescue doctrine applies in the following circumstances:

- When human life was apparently, although perhaps not actually, in danger (see *Hymes v Pollock* (1952) 108 CA2d 536, 538, 238 P2d 1056, 1057),
- Whether the danger was created by the defendant or another person or resulted from some innocent cause (*Scott v Texaco, Inc.* (1966) 239 CA2d 431, 435, 48 CR 785, 788), and
- When the rescuer acted to protect property (*Henshaw v Belyea* (1934) 220 C 458, 468, 31 P2d 348, 352).

A necessary element of the rule is that the plaintiff was injured in the course of attempting a rescue in the ordinary sense of that term. See *Bryant v Glastetter* (1995) 32 CA4th 770, 784, 38 CR2d 291 (rule not applicable to tow truck driver who was struck by another vehicle in attempting to remove an arrested intoxicated motorist's car from side of freeway).

The rescue doctrine cannot be invoked by a "professional rescuer" to avoid the firefighter's rule (see §4.79). *Holden v Chunestudey* (1980) 101 CA3d 959, 963, 161 CR 925 (officer injured climbing down hill to reach car driven off road by drunken driver). But see *Neighbarger v Irwin Indus., supra* (private safety employees not subject to firefighter's rule).

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Source: Torts/California Tort Guide/4 Automobiles/§4.76 b. Defendant's Willful Misconduct

§4.76 b. Defendant's Willful Misconduct

Before California's 1975 adoption of the comparative fault system, a plaintiff's negligence did not bar or reduce his recovery if the defendant's liability was based on willful misconduct (see §4.26). *Williams v Carr* (1968) 68 C2d 579, 588, 68 CR 305, 312 (automobile guest); *Lovett v Hitchcock* (1961) 192 CA2d 806, 810, 14 CR 117, 119 (pedestrian); *Cawog v Rothbaum* (1958) 165 CA2d 577, 589, 331 P2d 1063, 1070 (same). To bar recovery, the plaintiff's fault had to amount to "contributory willful misconduct." *Williams v Carr* (1968) 68 C2d 579, 586, 68 CR 305, 311.

Now it appears that a driver's intent to injure or reckless misconduct, however egregious, is a form of fault that is to be compared with the injured person's negligence or other fault in ascertaining the latter's damages. See §§1.41, 1.45, 1.57-1.59.

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B. Assumption of Risk

§4.77 1. General Principles

Conduct by a plaintiff that formerly was termed "assumption of the risk" providing the defendant a complete defense, is now "secondary assumption of risk," a form of contributory negligence that reduces, but does not bar, recovery. See *Li v Yellow Cab Co.* (1975) 13 C3d 804, 824, 119 CR 858 (assumption of risk abolished as separate defense except for plaintiff's conduct that amounts to release of defendant's obligation of reasonable care). See generally §§1.43, 1.46-1.55.

A court of appeal panel has, however, invoked the primary assumption of risk concept to bar a tow truck driver who was injured while preparing to tow a disabled car from recovering damages from the owner/operator of a car whose negligence was alleged to have led to the car breaking down on a highway. See *Dyer v Superior Court* (1997) 56 CA4th 61, 65 CR2d 85 (distinguishing firefighter's rule cases noted in §4.79).

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§4.78 2. Rider's Consent to Driver's Conduct

A plaintiff who rides with an intoxicated driver, formerly an assumption of risk, has "unreasonably undertaken to encounter a specific known risk created by defendant's negligence," and plaintiff's conduct is thus a form of contributory negligence that reduces, but does not bar, recovery. *Gonzalez v Garcia* (1977) 75 CA3d 874, 881, 142 CR 503 (plaintiff had the choice of riding or refusing to ride, and unreasonably chose the former). See §§4.69-4.70 on other consensual conduct by a rider that is now a form of contributory negligence. See generally §§1.43, 1.46-1.55.

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Source: Torts/California Tort Guide/4 Automobiles/§4.79 3. Firefighter's Rule

§4.79 3. Firefighter's Rule

The "firefighter's rule" is a special application of "primary assumption of risk," which limits the duty of care owed by the public to a *publicly employed* "peace officer, firefighter, or any emergency medical personnel" (hereafter, "officer"). See CC §1714.9; *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 538, 34 CR2d 630. See generally §1.55. Under this rule, a person who negligently causes the incident to which the officer was responding when injured is liable to the officer only if the person's conduct comes within an exception to the rule. See *Hubbard v Boelt* (1980) 28 C3d 480, 485, 169 CR 706 (officer injured during high-speed chase of reckless driver). See also *Walters v Sloan* (1977) 20 C3d 199, 202, 142 CR 152, disapproved in part at 8 C4th 538. (Note that *Hubbard* and *Walters* were decided before exceptions to the rule were codified in CC §1714.9(a).) See also *McElroy v State* (2002) 100 CA4th 546, 122 CR2d 612 (collision of patrol cars owned by different agencies; see discussion in §1.55).

A defendant is not immune from liability for injury-causing conduct that was intended to injure the officer or was arson. CC §1714.9(a)(3)-(4).

NOTE: It is uncertain to what extent the "intent to injure" exception has superseded holdings precluding an officer's recovery for a defendant's conduct that was reckless or wanton (see *Hubbard v Boelt, supra*; *Holden v Chunestudey* (1980) 101 CA3d 959, 962, 161 CR 925), or for a defendant's intentional acts that were within the scope of the risks assumed by the officer (see *City of Los Angeles v O'Brian* (1984) 154 CA3d 904, 201 CR 561 (suspected car thief rammed police car); *Lenthall v Maxwell* (1982) 138 CA3d 716, 188 CR 260).

A defendant is not immune from liability for injury-causing conduct that occurs *after* the defendant knew or should have known of the officer's presence. CC §1714.9(a)(1)-(2). Section 1714.9 thus codifies holdings that the firefighter's rule does not apply to independent acts of misconduct committed after the officer had arrived at the scene. See *Lipson v Superior Court* (1982) 31 C3d 362, 371, 182 CR 629; *Shaw v Plunkett* (1982) 135 CA3d 756, 185 CR 571 (officer arresting prostitute struck by car driven by prostitute's customer); *Krueger v City of Anaheim* (1982) 130 CA3d 166, 171, 181 CR 631 (officer injured by person resisting arrest); *Spargur v Park* (1982) 128 CA3d 469, 180 CR 257 (fact question whether car striking officer was separate, independent act); *Malo v Willis* (1981) 126 CA3d 543, 178 CR 774 (officer stopped defendant for speeding, injured when car lurched forward). See also *Terry v Garcia* (2003) 109 CA4th 245, 134 CR2d 565 (driver whose car collided with police car that was on its way, at high speed, to respond to domestic violence report could not assert rule; driver's alleged fault was independent from reason for officer's presence on road).

The damages of an officer who recovers under an exception to the firefighter's rule may be reduced by the officer's injury-causing comparative fault. CC §1714.9(b).

The firefighter's rule does not bar recovery by an officer whose injury resulted from negligence that is unrelated to the duties. See *City of Sacramento v Superior Court* (1982) 131 CA3d 395, 401, 182 CR 443 (presence of officer who was not involved in police pursuit was fortuitous and independent of pursuing officers' and suspect's conduct).

The rule has been applied to bar recovery by an off-duty officer on his way to work who responded to a traffic emergency as if he had been called to the scene. See *Kelhi v Fitzpatrick* (1994) 25 CA4th 1149, 1158, 31 CR2d 182 (officer struck by runaway tire while attempting to shield other cars).

The firefighter's rule does not bar a *privately employed* worker who is harmed while responding to a fire or other dangerous situation from recovering from the person who negligently created the situation. See *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 34 CR2d 630.

NOTE: In *Neighbarger*, the court rejected the reasoning in *Holland v Crumb* (1994) 26 CA4th 1844, 32 CR2d 366, in which the court applied the firefighter's rule to bar recovery, by a privately employed tow truck operator hit by a passing vehicle, from the driver of the car he was preparing to tow, which had been disabled through its driver's negligence. 8 C4th at 532 n4. The court in *Dyer v Superior Court* (1997) 56 CA4th 61, 65 CR2d 85, agrees that the firefighter's rule does not apply, but rules that the primary assumption of risk defense bars a tow truck driver from recovering from the driver of a disabled vehicle. See §4.77. See also *Bryant v Glastetter* (1995) 32 CA4th 770, 784, 38 CR2d 291 (rescue doctrine (§4.75) does not aid tow truck driver struck by vehicle while attempting

to remove arrested intoxicated motorist's car from side of freeway).

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Source: Torts/California Tort Guide/4 Automobiles/§4.80 C. Plaintiff's Willful Misconduct

§4.80 C. Plaintiff's Willful Misconduct

Before *Li v Yellow Cab Co.* (1975) 13 C3d 804, 119 CR 858, a plaintiff whose fault amounted to "contributory willful misconduct" was barred from recovery even when the defendant's fault was also willful misconduct. *Williams v Carr* (1968) 68 C2d 579, 586, 68 CR 305, 311. Now there is support for the view that a plaintiff's willful misconduct is to be compared with a defendant's fault to calculate a proportional reduction of the plaintiff's damages. See §1.45. See also *Blake v Moore* (1984) 162 CA3d 700, 707, 208 CR 703, holding that an intoxicated driver was entitled to invoke comparative fault rules even if his conduct amounted to willful misconduct. See §4.26.

On the other hand, several cases decided after the adoption of comparative fault, but without referring to it, have held that a plaintiff's willful misconduct would still be a total bar to recovery. See *Trenier v California Inv. & Dev. Corp.* (1980) 105 CA3d 44, 49, 164 CR 156 (defendant served liquor to plaintiff who was obviously intoxicated); *Sissle v Stefenoni* (1979) 88 CA3d 633, 636, 152 CR 56 (same); *Kindt v Kauffman* (1976) 57 CA3d 845, 852, 129 CR 603, disapproved on other grounds at 20 C3d 401 n1 (same). See also *Fosgate v Gonzales* (1980) 107 CA3d 951, 956, 166 CR 233 (whether pedestrian's intoxication constituted willful misconduct was question of fact); *Paula v Gagnon* (1978) 81 CA3d 680, 685, 146 CR 702 (whether intoxicated driver was guilty of willful misconduct was question of fact).

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Source: Torts/California Tort Guide/4 Automobiles/§4.81 D. Felons; Uninsured and Drunk Drivers

§4.81 D. Felons; Uninsured and Drunk Drivers

Under Proposition 213, an initiative measure passed November 5, 1996, for cases in which the initial trial began on or after January 1, 1997:

- A person injured while committing, or fleeing from the commission of, a felony for which he or she is later convicted cannot recover damages based on another's negligence (CC §3333.3).
- Noneconomic (and "nonpecuniary") damages "arising out of the operation or use of a motor vehicle" may not be recovered by a person who (a) owns a vehicle that is not insured as required by the financial liability laws; (b) is operating a vehicle while uninsured; or (c) was convicted of driving in violation of the "under the influence" laws (CC §3333.4).

Civil Code §3333.4 denies neither due process nor equal protection of the laws and has been applied retroactively to injuries suffered before November 6, 1996. *Quackenbush v Superior Court* (1997) 60 CA4th 454, 70 CR2d 271.

Section 3333.4 precludes an uninsured driver from recovering noneconomic damages from public entities under theories of nuisance and dangerous condition of property (as well as negligence). *Day v City of Fontana, supra*. Similarly, §3333.4 precludes an uninsured driver from recovering noneconomic damages from a private construction company that controlled the allegedly defective roadway at the time of the accident. *Allen v Sully Miller Contracting Co.* (2002) 28 C4th 222, 120 CR2d 795 (motorcyclist's fall caused by uneven surface). Conversely, an uninsured vehicle driver is not precluded by CC §3333.4 from recovering noneconomic personal injury damages in a product liability suit from the manufacturer of a defective vehicle. *Hodges v Superior Court (Ford Motor Co.)* (1999) 21 C4th 109, 86 CR2d 884 (damages alleged to result from defectively designed gas tank deemed not to arise from vehicle's operation or use). Similarly, the uninsured driver of a vehicle belonging to his or her employer is not precluded from recovering noneconomic damages from the driver of the other vehicle in a collision. *Montes v Gibbens* (1999) 71 CA4th 982, 84 CR2d 324 (employee driving employer's vehicle not required to show own financial responsibility).

The spouse of a vehicle's purchaser, injured while a passenger riding in it, is not precluded from recovering noneconomic damages on proof that she believed her husband had borrowed (not purchased) it from his employer 2 days earlier, and had never driven or ridden in it until the day of the accident. *Ieremia v Hilmar Unified Sch. Dist.* (2008) 166 CA4th 324, 82 CR3d 658 (unknowing possession of community property interest did not constitute ownership under Proposition 213).

The uninsured owner of a vehicle may recover noneconomic damages, under CC §3333.4(c), for injury caused by a defendant who was "convicted of" (not merely charged with) driving in violation of Veh C §23152 or §23153, the "under the influence" laws. See *Nakamura v Superior Court* (2000) 83 CA4th 825, 832, 100 CR2d 97 (defendant's drunk driving charge bargained down to "wet" reckless driving). The recovery of punitive damages by an uninsured owner or driver is not, however, precluded by CC §3333.4. 83 CA4th at 833.

The survivors of an uninsured vehicle owner or driver are not precluded by §3333.4 from recovering noneconomic wrongful death damages. *Horwich v Superior Court (Acuna)* (1999) 21 C4th 272, 87 CR2d 222 (parents of driver/owner permitted to recover damages for loss of care, comfort, and society).

NOTE: In *Horwich*, 21 C4th at 284, the court points out that defenses that can be asserted equally against the decedent and the heirs include comparative negligence, primary assumption of the risk (see §1.46), privilege, and collateral estoppel. The court also notes that it does not consider whether §3333.4 precludes recovery by the uninsured driver's estate of "survival" damages. 21 C4th at 275 n1. Similarly, in *Hodges v Superior Court, supra,* the court notes that it did not consider whether punitive damages come within the "nonpecuniary damages" the recovery of which may be precluded by §3333.4. 21 C4th at 113.

The owners of an uninsured vehicle are precluded by CC §3333.4 from recovering noneconomic wrongful death damages for the death of a minor child who was injured while riding in the vehicle from the public entity that owned and operated the other vehicle, but they are not precluded from recovering such damages from the same defendant in its capacity as operator of the helicopter that crashed while transporting the injured minor from the vehicle collision scene

to a hospital. *Anaya v Superior Court* (2002) 96 CA4th 136, 116 CR2d 660 (death in helicopter crash did not "aris[e] out of the operation or use of a motor vehicle" within the meaning of CC §3333.4).

An uninsured driver injured while exiting his parked uninsured vehicle is precluded by §3333.4 from recovering noneconomic damages. *Cabral v Los Angeles County Metro. Transp. Auth.* (1998) 66 CA4th 907, 78 CR2d 385. Similarly precluded is the owner of an uninsured vehicle injured when it was struck by another car as she was loading it. *Harris v Lammers* (2000) 84 CA4th 1072, 101 CR2d 361.

Civil Code §3333.4 precludes an uninsured driver from recovering noneconomic damages even if injured while acting within the scope of employment if the employer's liability policy expressly excludes coverage of employees driving their own vehicles. *Vargas v Athena Assur. Co.* (2001) 95 CA4th 461, 115 CR2d 426.

When the driver of a motor vehicle carries valid liability insurance, the vehicle is not "uninsured" under CC §3333.4, and the vehicle owner may recover noneconomic damages from other tortfeasors even though the owner does not carry insurance on the vehicle. *Goodson v Perfect Fit Enters., Inc.* (1998) 67 CA4th 508, 79 CR2d 102 (uninsured plaintiff entitled to wrongful death damages for loss of, *e.g.,* society and comfort of uninsured wife killed while their vehicle was being driven by their insured daughter-in-law).

NOTE: A person who has a personal liability umbrella policy that covers bodily injury damages is not an uninsured motorist, nor is his or her vehicle an uninsured vehicle, even if no other policy insures the vehicle, at least for purposes of Ins C §11580.2. See *California Capital Ins. Co. v Nielsen* (2007) 153 CA4th 1221, 64 CR3d 50.

A person driving a "Snorkelift" from the bed of a tow truck onto the bed of a dump truck who was injured when the two trucks moved apart, dropping the Snorkelift and the driver to the street below, is not barred by CC §3333.4 from recovering noneconomic damages inasmuch as the Snorkelift was not then being driven "on" a street or highway. *Garcia v Superior Court* (2006) 137 CA4th 342, 39 CR3d 902.

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§4.82 IV. POLICE PURSUITS: IMMUNITY; CIVIL RIGHTS

Vehicle Code §17004.7 immunizes public employees driving emergency vehicles from damages liability to persons injured during an immediate pursuit of a suspected law violator even if the pursuing officer negligently failed to activate his or her siren or emergency lights. *Cruz v Briseno* (2000) 22 C4th 568, 93 CR2d 715. Further, police recklessness during a vehicle pursuit does not give rise to liability from the fatal shooting of the fleeing driver during a pursuit on foot after the vehicle pursuit had ended. *Hernandez v City of Pomona* (2009) 46 C4th 501, 517, 94 CR3d 1 (both officers and employing public entity immune under Veh C §17004 and Govt C §815.2).

Vehicle Code §17004.7(b) provides that a public agency that adopts a written policy on vehicular pursuits that complies with §17004.7(c) is immune from damages liability for personal injury, death, or property damage resulting from the collision of a vehicle being operated by an actual or suspected law violator who is being, has been, or believes he or she is being or has been, pursued by a peace officer in a motor vehicle. *Alcala v City of Corcoran* (2007) 147 CA4th 666, 53 CR3d 908 (both city and its police department immune for injury and death of bystander caused by police car pursuing murder suspect); *Nguyen v City of Westminster* (2002) 103 CA4th 1161, 1168, 127 CR2d 388 (court, although applying statute to exonerate entity, criticizes it as giving entities "get out of liability free card," inasmuch as entity gained immunity even if it did not implement policy it adopted); *Ketchum v State* (1998) 62 CA4th 957, 73 CR2d 152 (statute does not violate due process; CHP policy provided adequate guidelines). See *Lewis v County of Sacramento* (2001) 93 CA4th 107, 113 CR2d 90 (public entity immune even though passenger was thrown from motorcycle of fleeing suspect and killed when hit by pursuing patrol car); *Weaver v State* (1998) 63 CA4th 188, 202, 73 CR2d 571 (Veh C §17004.7 immunized CHP; §17004 immunized the officers who deliberately rammed fleeing suspect's vehicle, injuring passenger). The written policy must cover (1) supervisory control, (2) responsibility for primary and secondary units, (3) interjurisdictional considerations, and (4) when to initiate and terminate a pursuit. See *McGee v City of Laguna Beach* (1997) 56 CA4th 537, 542, 65 CR2d 506.

There is no immunity, however, when the policy merely gives officers an unrestrained discretion to use subjective standards for determining when a pursuit should be initiated, continued, or terminated. *Berman v City of Daly City* (1993) 21 CA4th 276, 282, 26 CR2d 493.

An officer can take actions that place a fleeing motorist at risk of serious injury or death in order to stop a flight that endangers others. *Scott v Harris* (2007) 550 US 372, 167 L Ed 2d 686, 127 S Ct 1769 (ramming fleeing vehicle from behind did not violate driver's rights under 42 USC §1983). Further, an officer whose pursuit of a fleeing suspect results in the death of the suspect's passenger is not liable under 42 USC §1983 for violating the passenger's civil rights even if the officer's conduct displayed a deliberate indifference to, or reckless disregard for, the passenger's right to life and personal security. *County of Sacramento v Lewis* (1998) 523 US 833, 140 L Ed 2d 1043, 118 S Ct 1708 (in high-speed chase of motorcycle that "tipped over," officer's car hit and killed passenger).

A pursuing officer does not violate the civil rights of persons hit by the pursued vehicle so long as the conduct of the pursuing officer does not "shock the conscience." *Onossian v Block* (9th Cir 1999) 175 F3d 1169 (no evidence that pursuing officers intended to cause harm to anyone). Indeed, a police officer involved in a high-speed chase is entitled to qualified immunity under 42 USC §1983 unless the injured person can prove the officer acted with a deliberate intent to harm. *Bingue v Prunchak* (9th Cir 2008) 512 F3d 1169. See *Weaver v State* (1998) 63 CA4th 188, 203, 73 CR2d 571 (deliberately ramming fleeing vehicle did not violate passenger's civil rights; ramming was a "seizure" of the fleeing vehicle, but not, under circumstances, unreasonable).

An officer violates a fleeing traffic violator's civil rights, however, by shooting the violator dead after ramming his car off the road. See *Adams v Speers* (9th Cir 2007) 473 F3d 989 (absence of warning and of danger to anyone distinguishes case from those in which immunity deemed appropriate).

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5

Carriers

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I. INTRODUCTION

§5.1 A. Scope of Chapter

This chapter covers the liability of carriers for injuries to passengers or other patrons and for damage to freight. Air carriers are covered in chap 2, and the liability of railroads for injuries to third persons is discussed in chap 12. A carrier's liability under the public franchise rule for damages caused by a subhauler is discussed in §4.60.

This book does not cover cases decided under the federal Death on the High Seas Act (DOHSA) (46 USC §§761-767). See, *e.g., Beckett v Mastercraft Boat Co.*(2005) 126 CA4th 1045, 24 CR3d 490 (DOHSA, not California wrongful death statute, provides exclusive remedy for death in boat 14 miles inland on Mexican river); *Garofalo v Princess Cruises, Inc.* (2000) 85 CA4th 1060, 102 CR2d 754 (state courts have concurrent jurisdiction to hear DOHSA claims, but Act does not permit reimbursement recovery by decedent's employer). On damages recoverable under federal maritime law in DOHSA and other cases, see California Tort Damages §§2.1, 3.57, 4.15 (2d ed Cal CEB 2002). See Anno, 6 ALR6th 659 (2005) (enforceability of forum selection clause in cruise ticket).

This chapter also excludes coverage of the application of the Americans with Disabilities Act (ADA) (42 USC §§12101-12213) to carriers' duties to passengers who board with disabilities. See, *e.g., Spector v Norwegian Cruise Line, Ltd.* (2005) 545 US 119, 162 L Ed 2d 97, 125 S Ct 2169; *Lockett v Catalina Channel Express, Inc.* (9th Cir 2007) 496 F3d 1061 (carrier that enforced passenger's request for "dander-free area" on ferry by excluding blind person with guide dog from particular lounge not liable under ADA when exclusion in effect only 2 weeks while carrier investigated competing interests).

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B. Civil Code Definitions

§5.2 1. Carriage; Passenger-Carrier Relationship

"Carriage" is the conveyance of persons or property from one place to another. CC §2085.

For a passenger-carrier relationship to exist, there must be some physical transportation or carriage of the passenger. See *McDaniel v Dowell* (1962) 210 CA2d 26, 30, 26 CR 140, 143 (rope tow on ski slope). It is not necessary, however, that the carriage be from one place to another. See *Smith v O'Donnell* (1932) 215 C 714, 717, 12 P2d 933, 934 (private airplane ride). Even a person who has some control over the conveyance may be a passenger on a carrier. *McIntyre v Smoke Tree Ranch Stables* (1962) 205 CA2d 489, 492, 23 CR 339, 340 (riding mule in mule train).

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§5.3 2. Distinctions Affecting Duty

The Civil Code, in stating the nature of the duties owed by carriers, and the standards of care to which carriers must adhere in various situations, distinguishes between (a) carriers of persons (see §§5.6-5.18) and carriers of freight (see §§5.19-5.21), (b) common carriers and private carriers (see §5.4), and (c) carriers for reward (see §§5.6-5.17) and carriers without reward ("gratuitous" carriers; see §5.18). Basically, a carrier must use a higher degree of care for passengers' safety when carrying *for reward* (see CC §§2100, 2114), and a lesser degree of care when carrying *without reward* (see CC §§2089-2090, 2096, 2114).

The Civil Code distinctions between carriage "for reward" and "without reward" generally relate to the degree of care that must be used by the carrier, while the differences between "common" and "private" carriage relate to who and what must be carried. See *Squaw Valley Ski Corp. v Superior Court* (1992) 2 CA4th 1499, 1507, 3 CR2d 897 (chairlift operator owed paying customer duty to use utmost care and diligence to ensure safe carriage; Pub Util C §212(c), exempting ski lift facilities from definition of "common carrier," affects only administrative regulation of carriers, not tort liability rules).

Some courts have used "common carrier" to describe the operator that owes passengers the higher degrees of care discussed in §§5.6-5.8, particularly in situations in which it is conceded that the carriage was for reward. See Note in §5.6.

Although the operation of individual rides within an amusement park may be "carriage for reward" or "common carriage" under rules imposing a higher standard of care on such, the park itself is not a common carrier that the law prevents from offering discounted admissions to residents of some counties but not others. See *Simon v Walt Disney World* (2004) 114 CA4th 1162, 8 CR3d 459.

Other courts have rejected the idea that the Civil Code distinctions express a legislative intent that higher standards of care should apply to both common and private carriers *for reward,* while lower standards of care would apply in comparable situations to both common and private *gratuitous* carriers. See, *e.g., Webster v Ebright* (1992) 3 CA4th 784, 4 CR2d 714 ("general American rule" is that standard of utmost care (see §5.6) applies to *common* carriers, not to *private* carriers, of persons for reward). See also *Hopkins v Yellow Cab Co.* (1952) 114 CA2d 394, 398, 250 P2d 330, 332 (taxi company that contracted with school district to carry handicapped schoolchildren owed duty to use ordinary care).

NOTE: A 4-to-3 supreme court majority, in *Gomez v Superior Court (Walt Disney Co.)* (2005) 35 C4th 1125, 1130 n3, 29 CR3d 352, noting that it was conceded that the defendant was a common carrier for reward, declined to rule on whether a private carrier for reward is to be held to the same standard of care as a common carrier for reward, although it could be inferred from the opinion that "for reward" was the key factor for imposing CC §§2100, 2101 standards (see §§5.5-5.7). In retrospect, the facts in *Webster v Ebright, supra*—a stablekeeper hiring out a horse for a trail ride—created no carrier-passenger relationship under which the utmost care standard might have applied. *Webster* is factually distinguishable from the "mule train" case noted in §5.5.

A "private motor carrier" under the Motor Carriers of Property Permit Act (Veh C §§34600-34672) is not subject to the same nondelegable duty liability as are holders of public licenses or "for-hire" carriers. See *Hills Bros. Chem. Co. v Superior Court* (2004) 123 CA4th 1001, 1003, 20 CR3d 530 (corporation that owned trucks and hired independent contractor to operate them not liable for death of hiree's employee).

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§5.4 C. Obligation to Carry

A *common* carrier undertakes transportation functions for the public generally (CC §2168), while a *private* carrier engages to carry only those who enter into a special agreement with it. *Samuelson v PUC* (1951) 36 C2d 722, 728, 227 P2d 256, 259; *People v Duntley* (1932) 217 C 150, 163, 17 P2d 715, 720. A common carrier must, if able to do so, accept and carry whatever (and whomever) is offered to it, and must not give preference in time, price, or otherwise to one person over another. CC §§2168, 2169, 2170. See *Cordero v CIA Mexicana de Aviacion, S.A.* (9th Cir 1982) 681 F2d 669 (liability for discriminatory ejection of passenger).

A private carrier need not carry everyone who applies, although, if it is a business establishment, it may be liable for rejecting a potential passenger in violation of a civil rights or antidiscrimination law. See, *e.g.,* CC §51.

An operator that is ordinarily a common carrier may be a private carrier while operating its vehicles under a special contract or charter. *Hopkins v Yellow Cab Co.* (1952) 114 CA2d 394, 397, 250 P2d 330, 332; *Shannon v Central-Gaither Union Sch. Dist.* (1933) 133 CA 124, 128, 23 P2d 769, 770. See Anno, 42 ALR 853 (1926) (bus or stage).

A common carrier's duties include a duty to deliver a paying passenger to his or her destination. *Ingham v Luxor Cab Co.* (2001) 93 CA4th 1045, 1050, 113 CR2d 587 (cab company could be liable for injury suffered by infirm passenger in fall as she was walking up steep hill between her destination and place where driver told her she had to exit the cab; legal cause is jury question).

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Source: Torts/California Tort Guide/5 Carriers/§5.5 D. Kinds of Conveyances

§5.5 D. Kinds of Conveyances

Carriers of passengers operate such vehicles as the following:

- Railroad trains and cars (*McMillen v Southern Pac. Co.* (1956) 146 CA2d 216, 221, 303 P2d 788, 791; see *Hicks v Scott* (1941) 48 CA2d 481, 485, 120 P2d 107, 109 (sleeping car company));
- Streetcars (*Troutman v Los Angeles Transit Lines* (1947) 82 CA2d 183, 185, 185 P2d 616, 617; see *Finley v City & County of San Francisco* (1952) 115 CA2d 116, 120, 251 P2d 687, 690 (cable car));
- Buses (*Rocray v Pasadena City Lines, Inc.* (1958) 159 CA2d 265, 269, 323 P2d 772, 775);
- Taxicabs (*Larson v Blue & White Cab Co.* (1938) 24 CA2d 576, 578, 75 P2d 612, 613; see *Hopkins v Yellow Cab Co.* (1952) 114 CA2d 394, 398, 250 P2d 330, 332 (dictum));
- Airplanes (*Smith v O'Donnell* (1932) 215 C 714, 12 P2d 933; see §§2.15-2.19);
- Passenger ships (*Catalina Cruises, Inc. v Luna* (9th Cir 1998) 137 F3d 1422 (island to mainland passenger ferry); *American President Lines, Ltd. v Lundstrom* (9th Cir 1963) 323 F2d 817, 818); and
- Cruise ships (*Chan v Society Expeditions, Inc.* (9th Cir 1997) 123 F3d 1287 (passengers injured when "Zodiac" capsized while carrying them from the ship to an atoll for sightseeing).

Other contrivances to carry passengers in circumstances under which the operator may be a carrier of persons for reward (and a common carrier) include the following:

- Passenger elevators (*Harris v Smith* (1941) 44 CA2d 694, 696, 112 P2d 907, 909; see *Brown v George Pepperdine Found.* (1943) 23 C2d 256, 261, 143 P2d 929, 931; *Treadwell v Whittier* (1889) 80 C 574, 585, 22 P 266, 269 (customer on freight elevator); but see *Blanco v Marian Realty Co.* (1928) 204 C 145, 148, 266 P 798, 799 (employee on freight elevator));
- Escalators (*Vandagriff v J.C. Penney Co.* (1964) 228 CA2d 579, 582, 39 CR 671, 673);
- Motorboats and other pleasure vessels (see Anno, 63 ALR2d343, 355 (1959); see also *Alalunga Sportfishers, Inc. v County of San Diego* (1967) 247 CA2d 663, 668, 55 CR 875, 877);
- Guided mule trains (*McIntyre v Smoke Tree Ranch Stables* (1962) 205 CA2d 489, 492, 23 CR 339, 340);
- Ski chairlifts (*Platzer v Mammoth Mountain Ski Area* (2002) 104 CA4th 1253, 128 CR2d 885 (chairlift; see discussion in §5.27); *Squaw Valley Ski Corp. v Superior Court* (1992) 2 CA4th 1499, 1507, 3 CR2d 897 (patron injured while attempting to board lift; see note on this case in §5.2); *McDaniel v Dowell* (1962) 210 CA2d 26, 30, 26 CR 140, 143 (dictum); see Anno, 95 ALR3d 203 (1979) (ski lift or ski tow));
- Amusement park rides and devices (*Gomez v Superior Court (Walt Disney Co.)* (2005) 35 C4th 1125, 29 CR3d 352 (jeeplike vehicles in Indiana Jones ride; 4-to-3 decision; also noted in §§5.3, 5.6-5.7); *Neubauer v Disneyland, Inc.* (CD Cal 1995) 875 F Supp 672 (amusement ride boat rammed by another), *Kohl v Disneyland, Inc.* (1962) 201 CA2d 780, 783, 20 CR 367, 369 (horse-drawn surrey), *Barr v Venice Giant Dipper Co.* (1934) 138 CA 563, 564, 32 P2d 980 (roller coaster); see also *Pontecorvo v Clark* (1928) 95 CA 162, 176, 272 P 591, 597 (same; carrier status conceded), Anno, 66 ALR2d 689, 695 (1959) (roller coasters); but see *Davidson v Long Beach Pleasure Pier Co.* (1950) 99 CA2d 384, 387, 221 P2d 1005, 1007 (tilt-a-whirl)); and
- "Almost every vehicle which can be employed for the purpose" of transporting people (*Smith v O'Donnell* (1932) 215 C 714, 719, 12 P2d 933, 935).

See Annos, 86 ALR2d 350 (1962) (amusement rides generally), 75 ALR2d 792 (1961) (merry-go-round). See also Lab C §§7900-7915 (Amusement Rides Safety Law).

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II. CARRYING PASSENGERS FOR REWARD

A. Carrier's Duties

§5.6 1. Duty to Use Utmost Care and Diligence

A carrier of persons for reward, at least when functioning as a common carrier (see §5.3), must use the utmost care and diligence for their safe carriage, provide everything necessary for that purpose, and exercise a reasonable degree of skill. CC §2100; *Gomez v Superior Court (Walt Disney Co.)* (2005) 35 C4th 1125, 29 CR3d 352 (operator of amusement park ride subject to CC §2100; see also §§5.3, 5.5, 5.7); *McBride v Atchison, T. & S.F. Ry.* (1955) 44 C2d 113, 116, 279 P2d 966, 968. See *Lopez v Southern Cal. Rapid Transit Dist.* (1985) 40 C3d 780, 221 CR 840 (duty to use utmost care to protect one passenger from another; see §5.8).

Such a carrier must do all that human care, vigilance, and foresight can reasonably do in the circumstances, and is responsible for even the slightest negligence. *Acosta v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 19, 27, 84 CR 184; *Orr v Pacific S.W. Airlines* (1989) 208 CA3d 1467, 1472, 257 CR 18. See *Andrews v United Airlines* (9th Cir 1994) 24 F3d 39, 40 (rule stated; carrier's duty to do more than merely warn passengers about possibility of falling baggage). See also *Scarborough v Urgo* (1923) 191 C 341, 346, 216 P 584, 586 (care of very cautious person); *Brizzolari v Market St. Ry.* (1935) 7 CA2d 246, 248, 46 P2d 783, 784 (greater caution for child passenger). See §2.17 on air carrier's duty to use utmost care.

The care required is the highest that could reasonably be exercised (including exceptional foresight, skill, and caution), consistent with the mode of transportation used and the practical operation of the carrier's business. *Finley v City & County of San Francisco* (1952) 115 CA2d 116, 120, 251 P2d 687, 690.

A carrier for reward is not, however, an insurer; it is not liable for injury to its passengers without some negligence on its part. See *Andrews v United Airlines, Inc., supra*; *Lopez v Southern Cal. Rapid Transit Dist.* (1985) 40 C3d 780, 785, 221 CR 840 (degree of care and diligence that carrier must exercise is only such as can reasonably be exercised consistent with the character and mode of conveyance and practical operation of carrier's business). Compare *Ford v Carew & English* (1948) 89 CA2d 199, 203, 200 P2d 828, 830 (driver's sudden illness), with *Duran v Pickwick Stages Sys.* (1934) 140 CA 103, 108, 35 P2d 148, 150 (driver was aware of his illness). See Anno, 52 ALR3d 669 (1973) (injury due to physical condition of carrier's employee).

A carrier's breach of its duty to use the utmost care does not exonerate a passenger from comparative (proportional) liability for ordinary negligence that contributed to causing injury to another passenger. *USAir, Inc. v United States Dep't of Navy* (9th Cir 1994) 14 F3d 1410, 1414 (carrier entitled to pursue comparative indemnity claim against negligent passenger's employer).

The duty to use the utmost care and diligence encompasses requiring the carrier to collect and preserve information about a motorist involved in an accident with the carrier's vehicle for the sake of passengers' potential civil litigation. *De Vera v Long Beach Pub. Transp. Co.* (1986) 180 CA3d 782, 225 CR 789.

A carrier's duties to passengers may include a duty to warn of the dangers of sitting too long in one position. See *Haynes v National R.R. Passenger Corp.* (CD Cal 2006) 423 F Supp 2d 1073 (death from deep-vein thrombosis (DVT) after Amtrak journey from Chicago to Los Angeles; failure to warn claim not preempted by federal law; see also §5.7). See §2.22 on different rules for DVT from air travel.

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§5.7 2. Duty to Provide and Maintain Safe Equipment

A carrier of persons for reward must provide vehicles that are safe and fit for the purpose to which they are put, and the carrier is not excused from default in this respect by any degree of care. CC §2101. See *Gomez v Superior Court (Walt Disney Co.)* (2005) 35 C4th 1125, 29 CR3d 352 (operator of amusement park ride subject to CC §2101; see also §§5.3, 5.5-5.6); *Cooper v National R.R. Passenger Corp.* (1975) 45 CA3d 389, 395, 119 CR 541 (allegedly unsafe toilet facility), disapproved on other grounds at 20 C3d 401.

Stated another way, a carrier of paying passengers must exercise the utmost care to provide safe, suitable, and sufficient vehicles for their conveyance. *Treadwell v Whittier* (1889) 80 C 574, 588, 22 P 266, 270 (elevator); *McNeil v Yellow Cab Co.* (1978) 85 CA3d 116, 147 CR 733 (seatbelts in taxi); *Greyhound Lines, Inc. v Superior Court* (1970) 3 CA3d 356, 359, 83 CR 343 (seatbelts in bus); *Vandagriff v J.C. Penney Co.* (1964) 228 CA2d 579, 582, 39 CR 671, 673 (escalator); *McIntyre v Smoke Tree Ranch Stables* (1962) 205 CA2d 489, 493, 23 CR 339, 341 (selecting and training mules).

The duty of care extends to servicing, inspecting, and maintaining equipment. *Brown v George Pepperdine Found.* (1943) 23 C2d 256, 261, 143 P2d 929, 931 (elevator door); *Miller v Schell* (1957) 149 CA2d 346, 350, 308 P2d 445, 447 (elevator's ability to level at floor); *Wendler v Pickwick Stages Sys.* (1933) 133 CA 592, 595, 24 P2d 543, 544 (defective tires and rims). See Annos, 44 ALR2d 835 (1955) (tire failure), 21 ALR2d 420, 458 (1952) (defective seat).

The carrier's CC §2101 duty to provide and maintain safe vehicles is nondelegable; the carrier is responsible for defects in its equipment due to negligence of others in

- manufacture (*Siemsen v Oakland, S.L. & H. Elec. Ry.* (1901) 134 C 494, 499, 66 P 672, 674 (latent defect in wheel produced by another); *Treadwell v Whittier* (1889) 80 C 574, 595, 22 P 266, 272 (elevator built by another); *Morgan v Southern Pac. Co.* (1919) 45 CA 229, 233, 187 P 74, 76 (defective rail built by another)); or
- maintenance (*Vandagriff v J.C. Penney Co., supra*).

State law causes of action for unsafe equipment against some carriers may be preempted by federal law. See *Haynes v National R.R. Passenger Corp.* (CD Cal 2006) 423 F Supp 2d 1073 (claims related to seat design and configuration preempted by Amtrak Act (49 USC §§24301-24315), but claims based on failure to warn about deep-vein thrombosis (DVT) not preempted).

On other aspects of safe equipment, see *Torres v Cool Carriers* (1993) 26 CA4th 900, 31 CR2d 790 (vessel, not charterer, responsible for longshoreman's injury caused by defective deck grating). See Annos, 1 ALR4th 1249 (1980) (injury caused by debris in vehicle), 99 ALR3d 751 (1980) (injury caused by inhalation of exhaust or gas fumes). See also Anno, 35 ALR4th 1050 (1984) (vehicle manufacturer's liability for failing to provide devices for passengers' safety).

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§5.8 3. Duty to Protect Passengers From Assault

A carrier may be liable for failing to use the utmost care and diligence (see §5.6) to prevent one passenger from injuring another. See *Lopez v Southern Cal. Rapid Transit Dist.* (1985) 40 C3d 780, 785, 221 CR 840 (CC §2100 applied; transit district was aware of violent and assaultive conduct by passengers on particular bus route; driver failed to take any action in response to harassment of passengers by group of juveniles that escalated into violent fight; district has "special relationship" to passengers due to confined quarters and control reposed in driver); *Terrell v Key Sys.* (1945) 69 CA2d 682, 686, 159 P2d 704 (train operator knew of boisterous, vituperative, drunken crapshoots, failed to take steps to prevent physical assault).

Even under the "utmost care" standard, however, a carrier is not liable for failing to prevent an attack that it did not know, nor should have known, was about to occur. *City & County of San Francisco v Superior Court* (Colbert) (1994) 31 CA4th 45, 36 CR2d 372 (carrier not insurer of passenger's safety).

In some circumstances, the California Tort Claims Act (Govt C §§810-996.6) may provide a governmental entity that operates a means of conveyance an immunity from liability. See, *e.g., Hernandez v Southern Cal. Rapid Transit Dist.* (1983) 142 CA3d 1063, 191 CR 436, disapproved on other grounds at 40 C3d 790 (entity immune from liability for failure to provide police protection on buses).

On a carrier's liability for failing to prevent assaults by non-passengers, see Anno, 34 ALR4th 1054 (1984) (carrier's liability for assaults on passengers by third persons).

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B. Duration of Passenger Status

§5.9 1. Boarding

A person may become a passenger, and the carrier's special duty to him may begin, even before he boards the carrier's vehicle when (a) the person puts himself under the carrier's control or otherwise manifests an intent to board (*e.g.,* by entering a station or standing at a boarding site), and (b) the carrier or its operator manifests acceptance of him as a passenger. See *Seffert v Los Angeles Transit Lines* (1961) 56 C2d 498, 503, 15 CR 161, 164 (boarding bus); *Orr v Los Angeles Metropolitan Transit Auth.* (1963) 213 CA2d 699, 703, 29 CR 355, 357 (facts showed bus driver had not accepted passenger); *Garcia v San Diego Elec. Ry.* (1946) 75 CA2d 729, 733, 170 P2d 957, 959 (boarding bus through wrong door); *Lagomarsino v Market St. Ry.* (1945) 69 CA2d 388, 395, 158 P2d 982, 986 (person waiting to board one streetcar struck by another); *Grier v Ferrant* (1944) 62 CA2d 306, 310, 144 P2d 631, 633 (driver helped invalid from waiting room to taxi); *Riley v Davis* (1922) 57 CA 477, 481, 207 P 699, 701 (trying to board electric train). See also Annos, 28 ALR4th 748 (1984) (carrier's liability when passenger falls in space between platform and car), 93 ALR2d 237 (1964) (liability to boarding passengers; bus carrier), 75 ALR2d 988 (1961) (same; taxicab), 61 ALR2d 1113 (1958) (same; air carrier).

Advance fare payment is not essential to passenger status if the carrier customarily collects en route or at the end of the trip. *Lagomarsino v Market St. Ry.* (1945) 69 CA2d 388, 396, 158 P2d 982, 987; *Grier v Ferrant* (1944) 62 CA2d 306, 311, 144 P2d 631, 633.

A carrier may violate its duties to a boarding passenger in the following ways:

- Attempting to load in an unsafe place (*Sipperly v San Diego Yellow Cabs, Inc.* (1949) 89 CA2d 645, 649, 201 P2d 543, 546 (taxi protruding beyond parking lane struck by passing car);
- Starting before passenger is safely aboard (see *Seffert v Los Angeles Transit Lines, supra* (bus); *Riley v Davis* (1922) 57 CA 477, 488, 207 P 699, 701 (train); Anno, 93 ALR2d 237, 254 (1964) (bus);
- Starting before passenger is safely seated (*Acosta v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 19, 27, 84 CR 184);
- Closing door on passenger (*Rocray v Pasadena City Lines, Inc.* (1958) 159 CA2d 265, 269, 323 P2d 772, 775 (bus); *Garcia v San Diego Elec. Ry.* (1946) 75 CA2d 729, 734, 170 P2d 957, 960 (same); *Riis v Yellow Cab Co.* (1938) 29 CA2d 25, 26, 83 P2d 959 (taxi); see Anno, 93 ALR2d 237, 257 (1964) (bus)); or
- Failing to maintain safe steps or entrances (see Anno, 93 ALR2d 237, 261 (1964)).

Harm incurred while passing through a security checkpoint before boarding an airplane has been held not to be subject to Warsaw Convention (see §2.22) damages limitations. See *Dazo v Globe Airport Sec. Servs.* (9th Cir 2002) 295 F3d 934 (Convention does not apply to limit recovery for loss of carry-on bag).

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Source: Torts/California Tort Guide/5 Carriers/§5.10 2. Alighting

§5.10 2. Alighting

The carrier is generally not liable for injuries occurring after the passenger has left the conveyance. *MacLean v City & County of San Francisco* (1954) 127 CA2d 263, 271, 273 P2d 698, 703. But see *Dayton v Yellow Cab Co.* (1948) 85 CA2d 740, 745, 193 P2d 959, 961 (person who had alighted from taxi but was arguing about fare was not "discharged" as passenger). Discharge of the passenger does not terminate the relationship or the duty of utmost care, however, until the passenger

- has safely alighted (*McBride v Atchison, T. & S.F. Ry.* (1955) 44 C2d 113, 116, 279 P2d 966, 968),
- has been left at a relatively safe place (*Parker v City & County of San Francisco* (1958) 158 CA2d 597, 603, 323 P2d 108, 112),
- has been discharged out of the way of other traffic (*Parker v City & County of San Francisco, supra*; see Anno, 58 ALR2d 948 (1958)), and
- is no longer exposed to risks of the carrier's operation (*Brandelius v City & County of San Francisco* (1957) 47 C2d 729, 735, 306 P2d 432, 436 (passenger let out on tracks of oncoming cable car); *Mac Gregor v Pacific Elec. Ry.* (1936) 6 C2d 596, 600, 59 P2d 123, 125 (train passengers let out on other tracks); *Boa v San Francisco-Oakland Terminal Sys.* (1920) 182 C 93, 100, 187 P 2, 4 (passenger struck by streetcar overhang)).

See Annos, 16 ALR5th 1 (1993) (bus passenger struck by another vehicle), 7 ALR4th 1031 (1981) (bus passenger alighting at nonregular bus stop), 98 ALR3d 822 (1980) (taxicab), 42 ALR2d 1190 (1955) (motor carrier; hand in door).

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§5.11 3. In Stations

In addition to a carrier's duty to stop its vehicle at a place reasonably safe for passengers to board or alight (see §§5.9-5.10), the carrier must use utmost care in maintaining stations and conducting operations in them to avoid injury to boarding or alighting passengers. *Mac Gregor v Pacific Elec. Ry.* (1936) 6 C2d 596, 600, 59 P2d 123, 125; *Wilkinson v United R.Rs.* (1924) 195 C 185, 198, 232 P 131, 135; *Sexton v Key Sys. Transit Lines* (1956) 144 CA2d 719, 721, 301 P2d 612, 613.

A divided court of appeal panel has ruled that a rapid transit carrier breached no duty to an obviously intoxicated passenger by putting him off one train so that he might catch another and leaving him unattended on a raised station platform (off which he may have fallen, or at the edge of which he may have been struck by a train), concluding that the carrier's special relationship with the passenger had both ended (he had finished alighting) and not yet resumed (he was not yet boarding). *McGettigan v Bay Area Rapid Transit Dist.* (1997) 57 CA4th 1011, 67 CR2d 516 (carrier had no duty to assist inebriated passenger off platform).

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§5.12 4. Duties When Assisting Passengers

Traditionally, and absent a statute intended to aid the disabled, carriers have no duty to assist passengers in boarding or alighting. *Bua v G.I. Taxi Co.* (1960) 186 CA2d 612, 616, 9 CR 118. A carrier for reward, of course, does have a duty to give each passenger "a reasonable degree of attention." CC §2103.

A carrier that does undertake to assist a passenger in boarding or alighting must use due care in doing so. *Sanchez v Pacific Auto Stages* (1931) 116 CA 392, 394, 2 P2d 845, 847 (ticket agent escorted passenger from office to boarding area). See *Grier v Ferrant* (1944) 62 CA2d 306, 311, 144 P2d 631, 633 (driver helped semi-invalid from doctor's office to taxi).

Further, a carrier must give special assistance to a passenger who needs it because of age, illness, or other condition, if this need is known or apparent. *McBride v Atchison, T. & S.F. Ry.* (1955) 44 C2d 113, 119, 279 P2d 966, 970 (man on crutches leaving train); *Grier v Ferrant, supra*. But see *McGettigan v Bay Area Rapid Transit Dist.* (1997) 57 CA4th 1011, 67 CR2d 516, noted in §5.11. See Annos, 93 ALR2d 237 (1964), 75 ALR2d 988 (1961), 56 ALR2d 1257 (1957). See also *MacColl v Los Angeles Metro. Transit Auth.* (1966) 239 CA2d 302, 308, 48 CR 662, 666 (company safety rule and jury instruction on assisting elderly passengers); Anno, 92 ALR2d 656, 659 (1963) (illness or injury en route).

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§5.13 C. Proving Breach: Res Ipsa Loquitur

The res ipsa loquitur presumption may require a carrier to produce evidence that a passenger's injury was not caused by the carrier's negligence; it raises an inference that the defendant was negligent, although the plaintiff retains the burden of proof on the issue of defendant's fault. See §§1.26-1.33.

An inference of negligence based on res ipsa loquitur arises whenever a passenger's injury arises from the operation of the carrier's vehicle. The carrier can rebut the inference by showing either that the accident resulted from a cause entirely independent of the carrier's fault or that the carrier exercised due care in all respects in which it might have been negligent; but the high standard of care applied to a common carrier (of persons for reward) is reflected in a relaxation of the elements of proof for the res ipsa loquitur inference. *Irwin v Pacific S.W. Airlines* (1982) 133 CA3d 709, 715, 184 CR 228 (airplane overtook and collided with another plane). See Anno, 93 ALR3d 776 (1979) (application of res ipsa loquitur to injuries to boarding or alighting passengers).

On the other hand, the mere fact that a passenger was injured while on the carrier's vehicle does not give rise to an inference of negligence. *Steele v Pacific Elec. Ry.* (1914) 168 C 375, 379, 143 P 718; *Gray v City & County of San Francisco* (1962) 202 CA2d 319, 323, 20 CR 894. For the inference to arise, it must be shown that the injury resulted from the operation or movement of the vehicle or from something else under the carrier's control. *Hardin v San Jose City Lines, Inc.* (1953) 41 C2d 432, 436, 260 P2d 63 (bus); *Vandagriff v J.C. Penney Co.* (1964) 228 CA2d 579, 582, 39 CR 671 (escalator); *Lynch v Market St. Ry.* (1933) 130 CA 433, 439, 19 P2d 1009 (streetcar).

Res ipsa loquitur does not apply unless the accident is of a kind that ordinarily does not occur without the carrier's negligence. *Gray v City & County of San Francisco* (1962) 202 CA2d 319, 325, 20 CR 894 (fall boarding stationary vehicle); *Monastero v Los Angeles Transit Co.* (1955) 131 CA2d 156, 163, 280 P2d 187 (unforeseeable conduct of another passenger).

The carrier must produce sufficient evidence to balance an inference of negligence by showing that it used the required degree of care for passenger safety or by giving a satisfactory explanation of the accident. *Seffert v Los Angeles Transit Lines* (1961) 56 C2d 498, 502, 15 CR 161; *Hardin v San Jose City Lines, Inc.* (1953) 41 C2d 432, 435, 260 P2d 63; *Bourguignon v Peninsula Ry.* (1919) 40 CA 689, 694, 181 P 669. See *Irwin v Pacific S.W. Airlines, supra*; *Kohl v Disneyland, Inc.* (1962) 201 CA2d 780, 783, 20 CR 367 (jury could accept carrier's explanation); *McMillen v Southern Pac. Co.* (1956) 146 CA2d 216, 219, 303 P2d 788 (plaintiff failed to sustain burden of proof).

Res ipsa loquitur arises even when the vehicle movement or operation that resulted in the injury was not unusual. *Mudrick v Market St. Ry.* (1938) 11 C2d 724, 733, 81 P2d 950; *Prunty v Allred* (1946) 73 CA2d 67, 73, 165 P2d 935.

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§5.14 1. Movements of Carrier's Vehicle

Res ipsa loquitur has been applied when there is evidence that the injury occurred when the carrier's vehicle suddenly did the following:

- Started (*Lynch v Market St. Ry.* (1933) 130 CA 433, 439, 19 P2d 1009 (man boarding));
- Stopped (*Hardin v San Jose City Lines, Inc.* (1953) 41 C2d 432, 436, 260 P2d 63); and
- Jerked (*Mudrick v Market St. Ry.* (1938) 11 C2d 724, 733, 81 P2d 950).

The doctrine has also been applied in these cases:

- Doors closed on the passenger (*Seffert v Los Angeles Transit Lines* (1961) 56 C2d 498, 501, 15 CR 161);
- The vehicle went off the road (*Wright v Yosemite Transp. Co.* (1918) 38 CA 277, 175 P 905; see *Sinan v Atchison, T. & S.F. Ry.* (1930) 103 CA 703, 707, 284 P 1041 (train left rails)); and
- Baggage fell on the passenger (*Williamson v Pacific Greyhound Lines* (1947) 78 CA2d 482, 486, 177 P2d 977; see Anno, 68 ALR2d 667, 679 (1959)).

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§5.15 2. Collision With Another Vehicle

Res ipsa loquitur has been applied when a passenger was injured in a collision between the vehicle in which he was riding and a vehicle of the same carrier (*Bond v United R.Rs.* (1914) 24 CA 157, 161, 140 P 982) or of a third person (*Diaz v Los Angeles County Metropolitan Transp. Auth.* (2009) 175 CA4th 1297, 96 CR3d 780 (bus rear ended car; reversal for failure to give res ipsa instruction)).

The doctrine applies even when the other driver is also negligent (*St. Clair v McAlister* (1932) 216 C 95, 97, 13 P2d 924, 925) unless the plaintiff's own evidence proves that the other's negligence was the sole cause of the collision (*Jacob v Key Sys. Transit Lines* (1956) 140 CA2d 357, 362, 295 P2d 569, 572 (other person's sole negligence generally matter of defense)).

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§5.16 3. Failure of Carrier's Equipment

Res ipsa loquitur creates a presumption of the carrier's negligence when evidence shows that the passenger's injuries were caused by failure or breakage of the carrier's equipment. *Treadwell v Whittier* (1889) 80 C 574, 582, 22 P 266, 270 (fallen elevator); *Lawrence v Green* (1886) 70 C 417, 419, 11 P 750, 751 (overturned stagecoach); *Adam v Los Angeles Transit Lines* (1957) 154 CA2d 535, 539, 317 P2d 642, 645 (broken streetcar seat); *Morgan v Southern Pac. Co.* (1919) 45 CA 229, 235, 187 P 74, 76 (derailed train); *Vandagriff v J.C. Penney Co.* (1964) 228 CA2d 579, 583, 39 CR 671, 673 (doctrine applied to carrier and maintenance contractor jointly). See Anno, 44 ALR2d 835, 837 (1955) (motor carrier; tire failure).

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§5.17 4. Conditional Res Ipsa Loquitur

Conflicts in the evidence do not preclude application of res ipsa loquitur. *Prunty v Allred* (1946) 73 CA2d 67, 73, 165 P2d 935, 938. A conditional res ipsa loquitur instruction (see §1.35) must be given, however, when there are disputes on such issues as the following:

- Passenger status (*Seffert v Los Angeles Transit Lines* (1961) 56 C2d 498, 503, 15 CR 161, 164); and
- Whether the accident occurred as the plaintiff claimed (*Shaw v Pacific Greyhound Lines* (1958) 50 C2d 153, 157, 323 P2d 391, 393; *Hardin v San Jose City Lines, Inc.* (1953) 41 C2d 432, 435, 260 P2d 63, 64; see *Vandagriff v J.C. Penney Co.* (1964) 228 CA2d 579, 583, 39 CR 671, 674).

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§5.18 III. CARRYING PASSENGERS WITHOUT REWARD

A carrier of passengers *without reward* must use ordinary care and diligence for their safe carriage. CC §2096. See *Carpena v County of Los Angeles* (1960) 183 CA2d 541, 544, 7 CR 889, 891 (jail bus transporting prisoner); *Shannon v Central-Gaither Union Sch. Dist.* (1933) 133 CA 124, 128, 23 P2d 769, 770 (school bus).

The "reward" that requires the carrier to use the utmost care and diligence (see §5.6), however, may consist of any economic benefit or inducement to the carrier; payment of a fare is not essential. See *Smith v O'Donnell* (1932) 215 C 714, 721, 12 P2d 933, 935 (airplane owner took prospective customer for a ride); *Champagne v A. Hamburger & Sons* (1915) 169 C 683, 692, 147 P 954, 957 (store elevator). See Anno, 55 ALR2d 766 (1957) (status of employee traveling on pass).

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IV. CARRYING FREIGHT

A. Carriers' Duties

§5.19 1. Duties of "For Reward" and Common Freight Carriers

The basic duty of a carrier of property for reward is to use at least ordinary care and diligence in the performance of all the carrier's duties. CC §2114.

Nevertheless, an inland *common* carrier of property, unless the consignor accompanies the freight and retains exclusive control of it, is liable for loss or damage during the carriage from any cause except loss due to (1) an inherent defect in or spontaneous action of the property itself, (2) the act of a public enemy, (3) legal action, or (4) an irresistible superhuman cause. CC §2194. See CC §2182 (luggage). That is, a common carrier's liability to the owner of property damaged in transit is virtually absolute, in the nature of the liability of a limited insurer. *Anheuser-Busch, Inc. v Starley* (1946) 28 C2d 347, 349, 170 P2d 448, 450; *Franklin v Southern Pac. Co.* (1928) 203 C 680, 686, 265 P 936, 938. See also Annos, 39 ALR5th 763 (1996) (punitive damages for injury resulting from transporting, handling, or storage of toxic or hazardous substances); 31 ALR4th 658 (1984) ("public duty" exception to strict liability arising from carriage of hazardous substances).

To avoid liability, the burden is on the common carrier of freight to show that the loss resulted from one of the excepted causes. *Brignoli v Seaboard Transp. Co.* (1947) 29 C2d 782, 792, 178 P2d 445. See *Stockton Lumber Co. v California Nav. & Improvement Co.* (1909) 10 CA 197, 202, 101 P 541 (negligence of others not defense). Even then, the carrier is liable if its negligence exposed the property to the cause of the loss. CC §2195.

NOTE: A carrier liable to a consignee for damage during shipment may also be liable for commercial loss occasioned by delay in getting the equipment repaired and into service, even if the carrier's insurer unreasonably delayed payments to effect the needed repairs. See *Sanchez v Lindsey Morden Claims Servs., Inc.* (1999) 72 CA4th 249, 84 CR2d 799 (holding, however, that independent claims adjuster hired by insurer owed no duty to carrier even if adjuster's alleged negligent failure to promptly adjust claim resulted in increased carrier liability to consignee).

A common carrier may also be liable for losses resulting from the following:

- Breach of contract in preparing the goods for shipment (*Beall v Bekins Van & Storage Co.* (1917) 33 CA 652, 655, 166 P 370) or in packing (see Anno, 7 ALR3d 723 (1966));
- Failure to preserve or refrigerate perishable goods (*Newmark v Pacific Freight Lines* (1945) 67 CA2d 548, 553, 155 P2d 68 (truck delayed by storm); see *Jacobs, Malcolm & Burtt v Northern Pac. Ry.* (1925) 71 CA 42, 43, 234 P 328 (train without "standard ventilation")); or
- Improper loading (see Anno, 44 ALR2d 993 (1955)).

However, a common carrier is not liable for loss caused by delay unless

- it breaches its contract (*Pereira v Central Pac. R.R.* (1884) 66 C 92, 95, 4 P 988); or
- it is negligent (see CC §2196).

Negligence includes any failure to use reasonable diligence to protect the shipment during any delays. *Newmark v Pacific Freight Lines, supra*; *American Fruit Distribs. v Hines* (1921) 55 CA 377, 387, 203 P 821 (failure to refrigerate perishables during strike). See CC §3317 (damages for delay). See also CC §§2118-2119 (delivery).

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§5.20 2. Duties of Gratuitous and Private Freight Carriers

A private carrier of property for reward must use at least ordinary care to prevent damage to the freight. CC §2114; *W.C. Cook & Co. v White Truck & Transfer Co.* (1932) 124 CA 721, 725, 13 P2d 549.

The duty of a carrier of freight without reward (a "gratuitous" carrier) is to use at least slight care and diligence. CC §2114.

A private carrier of freight may be held to the liability of a common carrier (see §5.19) if it so contracts. *Alexson v Steward* (1921) 55 CA 251, 255, 203 P 423. Whether the carriage is common or private is often a factual issue. See *Brignoli v Seaboard Transp. Co.* (1947) 29 C2d 782, 178 P2d 445.

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§5.21 B. Liability Under Federal Interstate Commerce Law

Common carriers in interstate commerce are governed by federal law. See *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 915, 114 CR 622 (limitation on amount of freight carrier's liability); *Bauer v Jackson* (1971) 15 CA3d 358, 365, 93 CR 43 (limitation of liability to declared or agreed value of freight); *Wilson Furniture, Inc. v Southern Pac. Transp. Co.* (1972) 27 CA3d Supp 1, 103 CR 422 (determination of loss to consignee). See also *White v Mayflower Transit, LLC* (9th Cir 2008) 543 F3d 581 (Carmack Amendment to Interstate Commerce Act (49 USC §14706) provides exclusive cause of action for interstate shipping contract claims and preempts state law causes of action for delay, loss, damage, or failure to deliver); *Fireman's Fund Ins. Co. v Cho Yang Shipping* (9th Cir 1997) 131 F3d 1336 (validity of forum selection clause in bill of lading). Parties can opt out of Carmack Amendment protections. See *Regal-Beloit Corp. v Kawasaki Kisen Kaisha Ltd.* (9th Cir 2009) 557 F3d 985 (bills of lading designated Carriage of Goods by Sea Act (46 USC §§1300-1315) as law governing carrier's responsibility during entire shipment).

Under federal law, a shipper establishes a prima facie case by proving (1) that the goods were delivered to the carrier in good condition, (2) that the shipment arrived at its destination in damaged condition, and (3) the amount of the shipper's actual loss. *Convey-All Corp. v Pacific Intermountain Express Co.* (1981) 120 CA3d 116, 118, 174 CR 443 (shipper loaded newly manufactured goods that arrived damaged, establishing prima facie case; burden was on carrier to prove either that goods were damaged during loading or damaged during transit by one of five causes: act of God, public enemy, act of shipper, public authority, or inherent vice or nature of goods); *Vacco Indus. v Navajo Freight Lines, Inc.* (1976) 63 CA3d 262, 269, 133 CR 628. See also *Albany Ins. Co. v M.V. Istrian Express* (9th Cir 1995) 61 F3d 709 (shipper who proves that carrier received undamaged goods and delivered damaged goods has made prima facie case; burden shifts to carrier to show it was not responsible for damage).

When a shipment is not delivered, the carrier must pay damages equal to the value the shipment would have had to the recipient had it arrived safely, not merely the price paid to the shipper. See *Neptune Orient Lines, Ltd. v Burlington N. & S.F. Ry. Co.* (9th Cir 2000) 213 F3d 1118.

Initial and delivering carriers are subject to imputed liability for each other's negligence, or that of a connecting carrier, with a right of recoupment against the responsible carrier; an intermediate carrier is liable only for its own fault. 49 USC §11707. See Anno, 4 ALR3d 994, 999 (1965) (railroad; improper refrigeration).

The shipper need not prove negligence; the absence of fault is generally a defense. *Gulf, M. & O. R.R. v U.S.* (5th Cir 1968) 391 F2d 545, 547. But see *Hamilton Mfg. Co. v Chicago & N.W. Ry.* (7th Cir 1960) 277 F2d 652 (exception when loss due to inherent nature of property). A carrier's deviation from an agreed route may negate a liability limitation, leaving the carrier liable for the full value. See *Information Control Corp. v United Airlines Corp.* (1977) 73 CA3d 630, 140 CR 877 (computer lost in transit; airline lost 50-cents-per-pound tariff limitation); *Sea-Land Serv., Inc. v Lozen Int'l, LLC* (9th Cir 2002) 285 F3d 808 (issue of fact whether shipper's conduct constituted unreasonable deviation). See also *Varian Assocs. v Compagnie Generale Transatlantique* (1978) 85 CA3d 369, 149 CR 534 (federal $500-per-package limitation supersedes state law). See §5.28.

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V. CARRIERS' DEFENSES

A. Passengers' Injury Claims

§5.22 1. Contractual Limitations; Design Immunity

A common carrier cannot limit by contract its obligations to a passenger carried for compensation, although a carrier can, by special contract (not mere general notice), restrict its liability to a gratuitous passenger to injury caused by gross negligence, fraud, or willful misconduct. See CC §§2174-2175; *Walther v Southern Pac. Co.* (1911) 159 C 769, 772, 116 P 51, 53 (railroad employee on pass). See also *Pratt v Western Pac. R.R.* (1963) 213 CA2d 573, 581, 29 CR 108, 112 (failure to use slight care as gross negligence that cannot be exempted by agreement). On express assumption of risk and exculpatory agreements generally, see §1.54.

A carriage contract may contain a forum selection clause that limits an injured passenger to filing suit in a designated state. *Schlessinger v Holland Am., N.V.* (2004) 120 CA4th 552, 16 CR3d 5. See *Oltman v Holland America Line, Inc.* (9th Cir 2008) 538 F3d 1271 (equitable tolling overcame contractual limitation period when passengers, suing for illness, filed in correct federal court shortly after their timely filing in wrong forum (state court) was dismissed); *Murphy v Schneider Nat'l, Inc.* (9th Cir 2003) 349 F3d 1224 (effect on federal jurisdiction and venue of forum selection clause in long-haul truck operator's employment contract).

Merely referring to the "Athens Convention" in a clause printed on the back of cruise ship ticket is insufficient to impose liability limits on a passenger's recovery. *Wallis v Princess Cruises, Inc.* (9th Cir 2002) 306 F3d 827 (spouse's wrongful death and emotional distress damages after ship passenger went overboard).

A carrier that is a public entity may be able to escape liability for injury to a passenger resulting from the jerky start of the vehicle by showing that (1) such starts are inherent in the design of the vehicle; (2) it was the design (and not driver error, faulty maintenance, or some other factor) that caused the accident; (3) there had been discretionary approval of the design before construction of the vehicle; and (4) the design was reasonable. See *BART Dist. v Superior Court* (1996) 46 CA4th 476, 481, 53 CR2d 906. Limitations on liability for injury to or death of an airline passenger are discussed in §2.22.

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§5.23 2. Passenger's Contributory Negligence

A carrier may plead the injured passenger's contributory negligence. *Trulsson v Southern Pac. Co.* (1919) 42 CA 404, 407, 183 P 686, 688. The passenger's recovery of damages will be reduced in proportion to his fault compared with that of the carrier. See §1.41.

A carrier-operator's negligence is not imputed to a passenger in the passenger's action against a third person. *Simmons v Pacific Elec. Ry.* (1922) 60 CA 129, 139, 212 P 637, 640. (*Note:* Under Proposition 51 (CC §1431.2), of course, the carrier's fault percentage may reduce the noneconomic damages recoverable from the third person. See §1.69.)

Ordinarily, it is not contributory fault on a passenger's part to fail to do the following:

- Control or direct the operation of the conveyance or protest the manner of operation (*Dowd v Atlas Taxicab & Auto Serv.* (1921) 187 C 523, 526, 202 P 870, 871 (no protest about taxi's speed));
- Warn of impending collisions (*Basler v Sacramento Gas & Elec. Co.* (1910) 158 C 514, 520, 111 P 530, 532 (streetcars));
- Inspect the vehicle or its contents for defects or dangers (*Williamson v Pacific Greyhound Lines* (1949) 93 CA2d 484, 487, 209 P2d 146, 147); or
- Anticipate a sudden or violent jerk (*Acosta v Southern Cal. Rapid Transit Dist.* (1970) 2 C3d 19, 27, 84 CR 184; *Dempsey v Market St. Ry.* (1943) 23 C2d 110, 112, 142 P2d 929, 930).

A passenger must, however, protect himself against injury from ordinary vehicle movements. *Tait v City & County of San Francisco* (1956) 143 CA2d 787, 793, 300 P2d 74, 78.

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§5.24 a. Boarding; Alighting; Leaving Seat

A passenger's conduct in attempting to board or alight from a moving conveyance may constitute contributory negligence. *Gaskill v Pacific Elec. Ry.* (1916) 30 CA 593, 596, 159 P 200, 201 (boarding moving train); *Dougherty v Union Traction Co.* (1913) 23 CA 17, 24, 136 P 722, 724 (alighting from moving streetcar). The question is usually one of fact, however. See *Poak v Pacific Elec. Ry.* (1918) 177 C 190, 193, 170 P 159, 160 (aged person unaware train was moving); *Vietti v Hines* (1920) 48 CA 266, 271, 192 P 80, 81 (slowly moving train never stops completely at particular destination). See Anno, 31 ALR2d 931 (1953). See also Anno, 30 ALR2d 334 (1953) (handicapped or intoxicated passenger).

Alighting from a vehicle stopped away from the curb is not necessarily contributory negligence. See *Bua v G.I. Taxi Co.* (1960) 186 CA2d 612, 616, 9 CR 118, 120 (taxi left before passenger was completely out); *Healy v Yellow Cab Co.* (1939) 32 CA2d 479, 481, 90 P2d 116, 117 (passenger thought taxi was stopped against curb).

Standing on a vehicle without holding on may be contributory negligence. See *Tait v City & County of San Francisco* (1956) 143 CA2d 787, 790, 300 P2d 74, 76 (moving bus). See Anno, 52 ALR2d 585 (1957) (passenger leaving seat before conveyance stops).

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Source: Torts/California Tort Guide/5 Carriers/§5.25 b. Riding or Protruding Outside Vehicle

§5.25 b. Riding or Protruding Outside Vehicle

Contributory negligence is usually a question of fact when a passenger was doing either of the following:

- Riding on the steps or outside the vehicle (*Ivancich v Davis* (1921) 186 C 520, 527, 199 P 784, 787 (bus running board); *Kelly v Santa Barbara Consol. R.R.* (1915) 171 C 415, 418, 153 P 903, 906 (streetcar steps); see CC §2185 (certain common carriers' duty to provide seat for every passenger)); or
- Protruding from the vehicle (*Rogers v Los Angeles Transit Lines* (1955) 45 C2d 414, 418, 289 P2d 226, 228 (arm on windowsill)).

A passenger's violation of a statute or an ordinance may give rise to a rebuttable presumption of contributory negligence. Evid C §669 (discussed in §§1.31-1.34); *Reeves v Lapinta* (1938) 25 CA2d 680, 682, 78 P2d 465, 466 (ordinance against riding on autobus steps). See *Connard v Pacific Elec. Ry.* (1939) 14 C2d 375, 377, 94 P2d 567, 568 (passenger preparing to alight). See also CC §2186 (common carrier's right to require passengers to conform to carrier's lawful, public, uniform, and reasonable rules).

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§5.26 c. Conduct at Station

A passenger crossing the tracks at a station in boarding or alighting from a train has a right to assume it is safe to cross and is not necessarily required to look and listen for trains on other tracks. *Ferran v Southern Pac. Co.* (1935) 3 C2d 350, 355, 44 P2d 533, 535; *Wilkinson v United R.Rs.* (1924) 195 C 185, 196, 232 P 131, 135; *Sexton v Key Sys. Transit Lines* (1956) 144 CA2d 719, 721, 301 P2d 612, 613. But see *Trulsson v Southern Pac. Co.* (1919) 42 CA 404, 407, 183 P 686, 688 (contributory negligence in crossing outside station).

Standing too close to the tracks, however, may constitute contributory negligence, even if the plaintiff was on the station platform. *Gibson v Southern Pac. Co.* (1955) 137 CA2d 337, 353, 290 P2d 347, 357. See Anno, 63 ALR2d 1226 (1959).

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§5.27 3. Assumption of Risk; Exculpatory Agreements

Since the California Supreme Court's 1992 reformulation of the assumption of risk defense (see §§1.46-1.53), courts have not identified any circumstances in which a passenger's voluntarily undertaking to be conveyed by a carrier would constitute a primary assumption of risk that would furnish the carrier with a complete defense. Some passenger conduct, such as unreasonably agreeing to ride on an unsafe conveyance or with an impaired driver, would now be viewed as secondary assumption of risk, a form of contributory fault that could proportionally reduce, but not bar, the plaintiff's damages recovery.

An exculpatory agreement (see §1.54) by which a passenger assumes the risk of certain activities may exonerate a carrier from liability, even a carrier for reward that had a duty to use the utmost care and diligence (see §5.6). See *Booth v Santa Barbara Biplane Tours, LLC* (2008) 158 CA4th 1173, 1178, 70 CR3d 660 (plaintiffs claimed injury during emergency landing after plane lost power; no allegations of gross negligence; preflight release negated causes of action for negligence and breach of implied warranty; duty of utmost care not discussed); *Platzer v Mammoth Mountain Ski Area* (2002) 104 CA4th 1253, 128 CR2d 885 (ski-lift operator exonerated from liability for ordinary negligence alleged to have caused injury to child in fall from chairlift; gross negligence not proved).

Assumption of risk cases decided under former law include *Rogers v Los Angeles Transit Lines* (1955) 45 C2d 414, 418, 289 P2d 226, 228, and *Morgan v Los Angeles Pac. Co.* (1910) 13 CA 12, 16, 108 P 735, 737. See also Anno, 31 ALR2d 931, 942 (1953) (boarding moving train).

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B. Shippers' Claims for Damage to or Loss of Freight or Baggage

§5.28 1. Contractual Liability Limits

A carrier may, by agreement with the shipper, place value limitations on its liability for loss of or damage to freight. 49 USC §11707; *Donlon Bros. v Southern Pac. Co.* (1907) 151 C 763, 768, 91 P 603, 605 (racehorses carried intrastate); *Lovinger v Greyhound Lines, Inc.* (1976) 62 CA3d 240, 132 CR 914 (baggage carried interstate). See *Starrag v Maersk, Inc.* (9th Cir 2007) 486 F3d 607 (bill of lading extended COGSA $500 per package limit on freight damage (see below) to damage in storage yard, after aerospace equipment packages had been unloaded from ship); *King Jewelry, Inc. v Federal Express Corp.* (9th Cir 2003) 316 F3d 961 (under federal common law, carrier successfully limited its liability); *Read-Rite Corp. v Burlington Air Express, Ltd.* (9th Cir 1999) 186 F3d 1190 (English and federal common law applied to limit carriers' liability when Warsaw Convention (see §2.20) did not apply); *Power Standards Lab, Inc. v Federal Express Corp.* (2005) 127 CA4th 1039, 26 CR3d 202 (preemption by Airline Deregulation Act of 1978 (see §§2.15, 2.17) precluded state court from awarding relief greater than that contractually negotiated between carrier and shipper); *Dictor v David & Simon, Inc.* (2003) 106 CA4th 238, 130 CR2d 588 (50 cents per pound limitation in bill of lading limited carrier's liability to $7106 for loss of $267,488 in computer equipment); *Morville v United Parcel Serv.* (1983) 144 CA3d 552, 192 CR 779 (carrier's $100 limitation valid despite agreement between consignor and consignee); *Van Steinburg v Pacific S.W. Airlines* (1980) 102 CA3d 842, 160 CR 612 (airline tariff limiting carrier's liability for loss of baggage to $500 was binding on businessman who chose not to disclose high value of sample case or to pay for additional protection); *Amdahl Corp. v Profit Freight Sys. Inc.* (9th Cir 1995) 65 F3d 144 (liability limitation in "Shipper's Letter of Instructions" supersedes lower default limit in federal Carriage of Goods by Sea Act (46 USC §1304(5)). See also CC §2178 (statutory limitation on common carrier railroad's liability for baggage); *Kesel v United Parcel Serv., Inc.* (9th Cir 2003) 339 F3d 849 (carrier's refusal to insure shipment for more than value stated in customs document not violation of released value doctrine, which required reasonable notice of limited liability and fair opportunity to buy more insurance). But see *Franklin v Southern Pac. Co.* (1928) 203 C 680, 686, 265 P 936, 938. See Anno, 16 ALR3d 1111 (1967) (validity of agreements to exempt carrier from liability for damage at nonagency station). See §2.22 on monetary liability limitations under the Warsaw Convention for international shipments by air.

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§5.29 2. Liability Limits in Bills of Lading or Shipping Documents

A value limitation on liability in a bill of lading or shipping document is ineffective unless the shipper is informed of the limitation and given a fair opportunity to choose between a higher and lower liability or to refuse to make the shipment if the value is unacceptable to the carrier. *Schroeder v Auto Driveaway Co.* (1974) 11 C3d 908, 915, 114 CR 622 (liability limitation in small print on shipping order and freight bill was ineffective; shipper recovered compensatory and punitive damages); *Bauer v Jackson* (1971) 15 CA3d 358, 364, 93 CR 43 (jury question whether shipper agreed to limitation on value of horses). In addition, a carrier that deviates from an agreed route without the shipper's consent may lose the benefit of a value limitation on liability. See *Information Control Corp. v United Airlines Corp.* (1977) 73 CA3d 630, 140 CR 877 (part of computer lost by air carrier; deviation from route increased risk of loss and deprived carrier of 50-cents-per-pound limitation).

A bill of lading that incorporates the Carriage of Goods by Sea Act but does not expressly state that liability is limit to $500 per package may be insufficient to limit the carrier's liability. See *Continental Ins. Co. v Columbus Line, Inc.* (2003) 107 CA4th 1190, 133 CR2d 199 (damage to racing yacht mast). See also *Mbacke v Transcon Cargo, Inc.* (ED Cal, Jan. 25, 2008, No. Civ. S:06-1356 FCD EFB) 2008 US Dist Lexis 5615 (fact question whether shipper given fair opportunity to opt for higher liability limit by paying greater charge).

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§5.30 3. Statutory Liability Limits; COGSA

Such statutes as the Carriage of Goods by Sea Act (COGSA) (46 USC §§1300-1315) may limit a carrier's liability. See *Norfolk S. Ry. Co. v James N. Kirby, PTY Ltd* (2004) 543 US 14, 160 L Ed 2d 283, 125 S Ct 385 (under COGSA, liability limitations in bills of lading protected rail carrier when derailment on inland leg damages machinery being carried); *Kukje Hwajae Ins. Co. v M/V Hyundai Liberty* (9th Cir 2005) 408 F3d 1250 (cargo owner subject to forum-selection clause and damages limits); *Underwood Cotton Co. v Hyundai Merchant Marine (Am.), Inc.* (9th Cir 2002) 288 F3d 405 (COGSA 1-year limitation period applied to bar suit); *Travelers Indemnity Co. v Vessel Sam Houston* (9th Cir 1994) 26 F3d 895 ($500-per-package liability limit valid when shipper had fair opportunity to declare higher or lower value); *Komatsu, Ltd. v States S.S. Co.* (9th Cir 1982) 674 F2d 806 (same). See also *Akiyama Corp. of Am. v M.V. Hanjin Marseilles* (9th Cir 1998) 162 F3d 571 ("Himalaya clause" extended $500 limitation to terminal operator and stevedore); *Vision Air Flight Serv., Inc. v M/V National Pride* (9th Cir 1998) 155 F3d 1165 ($500 limit not applicable to intentionally destroyed goods); *G.F. Co. v Pan Ocean Shipping Co., Ltd.* (9th Cir 1994) 23 F3d 1498, 1507 (clause in bill of lading permitted shipper to present defense that goods were damaged when received); *All Pac. Trading, Inc. v Vessel M/V Hanjin Yosu* (9th Cir 1993) 7 F3d 1427, 1433 ($500-per-package limit applied to each package in container, not to each container).

On value limitations on the liability of a stevedoring company, see *Royal Ins. Co. v Sea-Land Serv.* (9th Cir 1995) 50 F3d 723 (yacht destroyed when dropped while being unloaded; carrier's contract with shipper, incorporating COGSA, limited both carrier's and stevedore's liability to $500); *Whitcombe v Stevedoring Servs. of Am.* (9th Cir 1993) 2 F3d 312 (damages against stevedore who negligently damaged "muscle cars" being shipped to Australia limited to declared value of cars; delivery of their container was bailment under CC §1840).

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§5.31 4. Other Defenses

A carrier by sea may invoke the "fire defenses" under 46 USC §§182 and 1304(2)(b) when damage to freight resulted from a shipboard fire. See *Nissan Fire & Marine Ins. Co. v M/V Hyundai Explorer* (9th Cir 1996) 93 F3d 641 (sufficient showing of due diligence to discover unseaworthy condition to establish fire defenses).

Additional defenses to a carrier's liability under 49 USC §11707 are that the loss of or injury to the freight was caused by an act of God, a public enemy, or public authority; by the inherent nature of the goods; or by an act or omission of the shipper. See *Vacco Indus. v Navajo Freight Lines, Inc.* (1976) 63 CA3d 262, 272, 133 CR 628 (evidence supported finding that machine was damaged by carrier, not improper packing by shipper).

A shipper's lawsuit against a carrier for freight damage can be barred by restrictions on the filing of claims and lawsuits that have been specified in the carrier's tariff on file with a governmental agency if the bill of lading or waybill refers to the tariff; actual notice of the limitation to the shipper is not required. *Clancy v Consolidated Freightways* (1982) 136 CA3d 543, 186 CR 257 (ICC motor vehicle common carrier; 2-year, 1-day limitation on filing suit after providing written notice of claim); *Talei v Pan Am. World Airways* (1982) 132 CA3d 904, 183 CR 532 (CAB air carrier; limits on time to present written claim). See *Comsource Indep. Foodservice Cos. v Union Pacific R.R. Co.* (9th Cir 1996) 102 F3d 438 (jury question whether shipper bound by 1-year limitation provision in tariff).

The forum selection clause in a bill of lading that includes a "Himalaya clause" (extending contract provisions designed to benefit the carrier to others assisting in the performance of the carriage) can be invoked by vessel owners and others. *Mazda Motors of Am. v M/V Cougar Ace* (9th Cir 2009) 565 F3d 573 (ocean vessel on which cars were damaged by water entitled to have claim adjudicated in Japan).

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6

Construction Work

I. OWNERS' AND GENERAL CONTRACTORS' LIABILITY
- A. Liability to Workers
  - 1. Duty to Use Ordinary Care §6.1
    - a. Failure to Warn of Dangers §6.2
    - b. Failure to Correct Dangerous Conditions §6.3
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I. OWNERS' AND GENERAL CONTRACTORS' LIABILITY

A. Liability to Workers

§6.1 1. Duty to Use Ordinary Care

An owner of property on which work is being done, and a general contractor supervising such work, may be liable to workers at the site for failing to use ordinary care to (1) provide them with a reasonably safe workplace, (2) warn of dangers that are not obvious, and (3) keep the premises in a reasonably safe condition. See *Florez v Groom Dev. Co.* (1959) 53 C2d 347, 354, 1 CR 840, 844; *Souza v Pratico* (1966) 245 CA2d 651, 656, 54 CR 159, 163; *Scott v John E. Branagh & Son* (1965) 234 CA2d 435, 440, 44 CR 384, 387; *Miller v Pacific Constructors, Inc.* (1945) 68 CA2d 529, 544, 157 P2d 57, 64. See also *Whitford v Swinerton & Walberg Co.* (1995) 34 CA4th 1054, 40 CR2d 688 (general contractor's negligent failure to fulfill its own obligations to provide for the safety of subcontractor's employees distinguished from negligence attributed to subcontractor).

NOTE: Workers' compensation law's exclusive remedy rules ordinarily immunize a site owner from tort liability to its own employees and a general contractor from liability to its own employees. See §6.21. However, an owner is not immune from liability to a general contractor's employee, a general contractor is not immune from liability to an owner's employee, and neither an owner nor a general contractor is immune from liability to a subcontractor's (or other independent contractor's) employee. But see §§6.9-6.12 on owners' and general contractors' liability to employees of hired independent contractors.

The duty to use ordinary care to avoid injuring others normally extends to persons engaged in hazardous work. *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 536, 34 CR2d 630. On each person's basic duty to use ordinary care, see §§1.4-1.10. These common-law obligations are separate from duties that may be imposed on the general contractor or site owner by statute or contract. See *Morehouse v Taubman Co.* (1970) 5 CA3d 548, 554, 85 CR 308; §§6.4-6.7. On property owners' duties generally, see §§10.3-10.29.

An owner's, and a general contractor's, duty to use due care to keep the premises in a reasonably safe condition and to give warning of latent or concealed peril does not, however, make them insurers of the workers' safety. See *Florez v Groom Dev. Co., supra* (owner); *Elder v Pacific Tel. & Tel. Co.* (1977) 66 CA3d 650, 661, 136 CR 203 (general contractor not liable to subcontractor's employees; relationship with subcontractor was so attenuated and control over premises so small as to make protective measures unfeasible).

NOTE: Recent judicial limitation of the "spoliation of evidence" tort (see Note in §1.2) casts doubt on dicta that, following a construction site (or other workplace) injury, the general contractor or employer that has possession of a tool or other item that might be useful to the injured worker in establishing someone else's liability may be liable for failing to preserve the item. See *Gomez v Aquistapace* (1996) 50 CA4th 740, 57 CR2d 821 (workers' compensation exclusive remedy provisions no bar to negligent, and intentional, spoliation of evidence causes of action). See also *Lewis v J.C. Penney, Inc.* (ED Cal 1998) 12 F Supp 2d 1083, 1086 (store employee who fell from stepladder failed to establish basis for recovery for store's negligent or intentional discarding of ladder).

For a comprehensive discussion of construction law, including tort liability, see California Construction Contracts, Defects, and Litigation (Cal CEB 2008).

For discussion of the procedural aspects of injured workers' lawsuits against general contractors, owners, and other persons "other than the [worker's] employer" (as well as against employers, coemployees, and workers' compensation insurers), see California Workers' Damages Practice (2d ed Cal CEB 2001).

On the liability (to an injured worker) of a public entity that issued a building permit without requiring the contractor to obtain workers' compensation insurance, see discussion of *Morris v County of Marin* (1977) 18 C3d 901, 136 CR 251, in §8.9.

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§6.2 a. Failure to Warn of Dangers

The liability of a general contractor or owner cannot be based solely on failure to warn a worker of a dangerous condition that was, or should have been, obvious to the worker. *Felmlee v Falcon Cable TV* (1995) 36 CA4th 1032, 1039, 43 CR2d 158 (jury instructed that defendant owed no duty to warn plaintiff of danger that was obvious or that should have been observed in the exercise of ordinary care); *Elder v Pacific Tel. & Tel. Co.* (1977) 66 CA3d 650, 661, 136 CR 203 (source of *Felmlee* instruction).

It would be error, however, to instruct a jury in words that would preclude them from holding a general contractor or owner liable for breaching a duty other than failure to warn of an obvious danger. *Osborn v Mission Ready Mix* (1990) 224 CA3d 104, 115, 273 CR 457 (contractor may have duty to remedy dangerous condition even without duty to warn of it; see §6.3). See *Felmlee v Falcon Cable TV, supra* (proper instruction permitted jury to find contractor liable for (a) failing to warn of danger that was not obvious, (b) failing to correct dangerous condition (see §6.3), or (c) breaching a nondelegable duty (see §6.4)).

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Source: Torts/California Tort Guide/6 Construction Work/§6.3 b. Failure to Correct Dangerous Conditions

§6.3 b. Failure to Correct Dangerous Conditions

The owner (or possessor) of a worksite that hires an independent contractor can be liable to that contractor's employee for injury resulting from a dangerous condition only if (1) the owner knew, or should have known, of a latent, preexisting hazardous condition, (2) the independent contractor did not know of the condition and could not reasonably have discovered it, and (3) the owner failed to warn the contractor about the condition. *Kinsman v Unocal Corp.* (2005) 37 C4th 659, 674, 36 CR3d 495 (scaffolding contractor's employee exposed to asbestos dust generated by work of other independent contractors at the site). The *Kinsman* opinion suggests that when an owner or general contractor delegates a task to an independent contractor, it has ordinarily, in effect, delegated to that contractor the responsibility to perform the task safely. 36 C4th 671. The *Kinsman* opinion concludes that the restrictions it imposes on a hirer's liability to an independent contractor's employee reflects principles and reasoning in *Privette v Superior Court (Contreras)* (1993) 5 C4th 689, 21 CR2d 72, and its progeny (see §§6.10-6.12).

For a pre-*Privette* case holding that a general contractor or owner could be liable for failing to correct a dangerous condition (1) of which, in the exercise of ordinary care, it knew or should have known, even if the danger was obvious to workers at the site (thus eliminating the need to warn of the danger), and (2) if it was reasonably foreseeable that the danger, despite its obviousness, could cause injury, as when practical necessity requires workers at the site to encounter it, see *Osborn v Mission Ready Mix* (1990) 224 CA3d 104, 121, 273 CR 457 (rejecting contrary statements in *Elder v Pacific Tel. & Tel. Co.* (1977) 66 CA3d 650, 136 CR 203 and *Souza v Pratico* (1966) 245 CA2d 651, 54 CR 159). Other pre-*Privette* cases held that liability for a dangerous condition could be imposed on an owner or general contractor who

- created the condition, personally or through an employee (see *Hatfield v Levy Bros.* (1941) 18 C2d 798, 806, 117 P2d 841, 845);
- had notice of the condition or by reasonable inspection should have discovered it, and had sufficient control to take reasonable safety measures (see *Caswell v Lynch* (1972) 23 CA3d 87, 91, 99 CR 880; *Gonzales v Robert Hiller Constr. Co.* (1960) 179 CA2d 522, 530, 3 CR 832, 837; *Stilson v Moulton-Niguel Water Dist.* (1971) 21 CA3d 928, 940, 98 CR 914 (engineers had supervisory control over construction work)); or
- knew, or should have known, that a subcontractor's work had created a type of dangerous condition that may reasonably be expected to recur unless precautions are taken, and to which other subcontractors' employees could be exposed yet remain unaware (see *Kuntz v Del E. Webb Constr. Co.* (1961) 57 C2d 100, 105, 18 CR 527 (see also §6.8)).

Pre-*Privette* cases on a property owner's general duty to use care to protect a worker on the property from a dangerous condition include *Griesel v Dart Indus.* (1979) 23 C3d 578, 587, 153 CR 213, overruled on other grounds at 5 C4th 696 (*Privette*), and *Mackey v Campbell Constr. Co.* (1980) 101 CA3d 774, 789, 162 CR 64 (owner's duty to use ordinary care in managing jobsite reduced or abrogated if owner gives complete control and supervision of it to subcontractor).

NOTE: Additional discussion of liability to a subcontractor's employee for failing to correct a dangerous condition is found in two court of appeal opinions that may not be cited to or by a court because the California Supreme Court dismissed appeals after granting review. In *Zeiger v State* (review dismissed Sept. 23, 1998, and remanded to court of appeal; superseded opinion at 58 CA4th 532, 68 CR2d 39), a court of appeal panel concluded that a site owner and a general contractor that knew a scaffold was dangerous could be liable for failing to prevent a subcontractor's employee from working from it. On the other hand, in *Voigts v Brutoco Eng'g & Constr. Co.* (review dismissed Sept. 23, 1998, and remanded to court of appeal; superseded opinion at 49 CA4th 354, 57 CR2d 87), another court of appeal panel ruled that a subcontractor's employee was precluded, by the reasoning in *Privette v Superior Court (Contreras)* (1993) 5 C4th 689, 21 CR2d 72 (discussed in §6.12), from recovering damages from a general contractor who knew that the employee was using an unsafe scaffold that the subcontractor had erected, arguing that liability should be imposed only if the general contractor's fault was "meaningfully independent" from the subcontractor's fault.

See Annos, 29 ALR4th 1188 (1984) (public entity liability to highway contractor's employee), 14 ALR4th 1161 (1982) (union liability for injury resulting from unsafe working conditions).

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§6.4 2. Violation of Safety Statute or Regulation

Under Lab C §6304.5, a person injured at a construction site may introduce evidence of California Occupational Safety and Health (Cal-OSHA) statutes and regulations (see Lab C §§6300-8004 and 8 Cal Code Regs §§1502-1938) to (1) establish a standard of care and (2) create a presumption of negligence, concerning negligent conduct. *Elsner v Uveges* (2004) 34 C4th 915, 22 CR3d 530 (retroactive application of amendment not permitted). A court may take judicial notice (under Evid C §452) of such a safety standard, and proof of a violation creates a rebuttable presumption of negligence (under CCP §669), as would the violation of any other statute, ordinance, or regulation. See §§1.31-1.34 on this presumption. See generally Smith, Elsner v. Uveges *and OSHA Into Evidence*, 35 CAOC Forum No. 4, p33 (Consumer Attorneys of California), May 2005.

Labor Code §6304.5 does not permit, in a personal injury or wrongful death suit, except as between an employee and his or her own employee (1) reference to the fact that the Occupational Safety and Health Division has or has not issued a citation or (2) the admission of the testimony of OSH Division employees as expert opinion or "with respect to the application of occupational safety and health standards." The section expresses a legislative intent that the safety statutes and standards "are applicable to proceedings against employers for the exclusive purpose of maintaining and enforcing employee safety" and that the section shall not abrogate the holding in *Brock v State* (1978) 81 CA3d 752, 146 CR 716, that the state is not liable for injuries caused by its failure to enforce safety statutes.

Violation of safety statutes, regulations, and orders adopted in or under the Labor Code cannot be invoked as a basis for finding a homeowner liable for injury incurred by the employee of someone hired by the homeowner to do work, such as trimming tall trees, that although it requires a contractor's license is deemed to be "household domestic service." *Fernandez v Lawson* (2003) 31 C4th 31, 36, 1 CR3d 422. See *Cortez v Abich* (2009) 177 CA4th 261, 98 CR3d 830 (under Lab C §2750.5, homeowner was employer of unlicensed contractor's employee, but not liable for alleged CalOSHA violation); *Zaragoza v Ibarra* (2009) 174 CA4th 1012, 95 CR3d 64 (garage conversion; fall from ladder; no showing of owners' lack of ordinary care).

Further, a homeowner who has hired a tree-trimming service is not liable for the electrocution death of an employee of the service under allegations of having violated Pen C §385, which makes it a crime to permit an employee to move a saw to within six feet of a power line. See *Ramirez v Nelson* (2008) 44 C4th 908, 80 CR3d 728 (employee was the one who breached duty of care embodied in the statute).

For further discussion, see California Workers' Damages Practice §§4.22-4.24, 4.35, 4.62-4.63 (2d ed Cal CEB 2001).

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§6.5 a. Cases Under 1972-2000 Law

The version of Lab C §6304.5 that was in effect from April 1, 1972, to January 1, 2000, precluded consideration of Cal-OSHA safety statutes and regulations in lawsuits by injured workers against third parties. See *Griesel v Dart Indus.* (1979) 23 C3d 578, 588, 153 CR 213, overruled on other grounds at 5 C4th 696; *Spencer v G. A. MacDonald Constr. Co.* (1976) 63 CA3d 836, 852, 134 CR 78 (Lab C §6304.5 is constitutional). But even when that version of §6304.5 barred the introduction of safety statute violations, some forms of evidence fell outside the prohibition. See, *e.g., Salinero v Pon* (1981) 124 CA3d 120, 131, 177 CR 204 (§6304.5 no bar to introduction of non-Labor Code safety provisions, such as those in city building codes or regulations, although such ordinances do not always give rise to presumption of negligence). See also *Felmlee v Falcon Cable TV* (1995) 36 CA4th 1032, 1038, 43 CR2d 158 (contractor's potential liability for injury resulting from violation of county ordinance or PUC General Order not abrogated by decision in *Privette v Superior Court (Contreras)* (1993) 5 C4th 689, 21 CR2d 72; discussed in §6.12). Further, the statute did not prevent an expert witness from testifying about a "custom and practice" in the industry, even though the custom was later incorporated into a safety statute or order. See *Mackey v Campbell Constr. Co.* (1980) 101 CA3d 774, 789, 162 CR 64 (testimony that custom in California was that height to width ratio of scaffolds should not exceed 3 to 1; cross-examination based on regulations in other states permitting larger ratios was properly excluded).

NOTE: The 1972-1999 version of Lab C §6304.5 also precluded a third party defendant from citing such standards as a basis for arguing that the design of a machine was not defective. See *Widson v International Harvester Co.* (1984) 153 CA3d 45, 51, 200 CR 136.

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§6.6 b. Case Under Pre-1972 Law

For conduct occurring before April 1, 1972, general contractors, owners, and others who had direction, management, control, or custody of construction sites or other places of employment had been held (1) to have a statutory duty to furnish workers a safe place to work (Lab C §§6400-6401) and (2) to be rebuttably presumed to be negligent if they violated any safety statute or regulation. See *Morgan v Stubblefield* (1972) 6 C3d 606, 618, 100 CR 1; *Alber v Owens* (1967) 66 C2d 790, 59 CR 117. These statutory duties were held to be greater than those imposed by general tort law. See *Conner v Utah Constr. & Mining Co.* (1964) 231 CA2d 263, 271, 41 CR 728. Of course, to create a presumption of a defendant's negligence, the worker needed to show that it was the defendant, not some subcontractor, whose safety order violation caused the worker's injury. See *Smith v ACandS, Inc.* (1994) 31 CA4th 77, 37 CR2d 457, disapproved on other grounds at 25 C4th 1245 (cause of action held to have arisen before April 1, 1972; asbestos injury did not cause disability until some 20 years after exposure). See also *Snyder v Southern Cal. Edison Co.* (1955) 44 C2d 793, 801, 285 P2d 912, 917 (duty imposed by Public Utility Commission General Order 95).

A duty imposed on a general contractor by statute, ordinance, or regulation is often viewed as "nondelegable"; the general contractor remains liable to the injured person even when the contractor has delegated responsibility for the work, or particular aspects of workplace safety, to an independent contractor. See *Felmlee v Falcon Cable TV* (1995) 36 CA4th 1032, 1036, 43 CR2d 158, which defines "nondelegable duty" as "a definitive affirmative duty the law imposes on one by reason of his or her relationship with others," and notes that it cannot be escaped by entrusting it to an independent contractor, citing *Snyder v Southern Cal. Edison Co.* (1955) 44 C2d 793, 800, 285 P2d 912. But see *Sheeler v Greystone Homes, Inc.* (2003) 113 CA4th 908, 6 CR3d 683 (general contractor not liable under nondelegable duty theory to subcontractor's employee who tripped on trash not cleaned up by other subcontractor); *Park v Burlington N. Santa Fe Ry. Co.* (2003) 108 CA4th 595, 609, 133 CR2d 757 (hirer of independent contractor, despite ultimate statutory responsibility for safe disposal of used batteries, not liable for injury to contractor's employee; see §6.9).

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§6.7 3. Contractual Safety Obligations

The contracts between an owner and a general contractor, or between the general contractor and subcontractors, may impose responsibility for the safety of workers and others on one of the contracting parties. See, *e.g., LaCount v Hensel Phelps Constr. Co.* (1978) 79 CA3d 754, 772, 145 CR 244 (contract between owner and general contractor may impose nondelegable duties; *i.e.,* general contractor can be liable for injuries caused by breach of such duties by a subcontractor's employees). *LaCount* also notes, but does not decide, the question of whether a defendant can be liable for failing to perform a contractual obligation to ensure that all safety statutes and orders (see §6.4) are complied with. 79 CA3d at 774. See also *Whitford v Swinerton & Walberg Co.* (1995) 34 CA4th 1054, 40 CR2d 688 (general contractor had contracted with owner to "follow all prevailing government codes and regulations," as well as, apparently, to formulate a work plan and safety program, ensure that workers had safe workplace, and provide safety officer to monitor and enforce jobsite safety and worker and subcontractor compliance with safety regulations).

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§6.8 B. Liability to Other Construction Site Visitors

An owner or general contractor who exercises control over private premises owes a duty of ordinary care to a person permitted on the premises whether

- at the owner's or contractor's request (*Solgaard v Guy F. Atkinson Co.* (1971) 6 C3d 361, 366, 99 CR 29 (physician called to site to rescue trapped workmen));
- as a business patron (*Chance v Lawry's, Inc.* (1962) 58 C2d 368, 376, 24 CR 209, 213); or
- in another capacity (*McCall v Otis Elevator Co.* (1963) 219 CA2d 22, 28, 33 CR 44, 48 (owner's employee; status characterization immaterial)).

A contractor may also owe a duty of ordinary care to uninvited persons if their presence is foreseeable. See *Cappa v Oscar C. Holmes, Inc.* (1972) 25 CA3d 978, 983, 102 CR 207 (trespasser in parking structure under construction). See also §10.4.

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C. Liability for Acts of Independent Contractors and Subcontractors

§6.9 1. General Rule: Nonliability

The general rule is that one who hires an independent contractor to do a task is not vicariously liable for injury caused by the independent contractor's negligence. Thus, a construction site owner or general contractor is not ordinarily liable for accidents that are

- caused solely by the operations of a subcontractor over whom the defendant had no control or supervision (*Johnson v Cal-West Constr. Co.* (1962) 204 CA2d 610, 612, 22 CR 492, 493; see *Caswell v Lynch* (1972) 23 CA3d 87, 91, 99 CR 880 (dictum); Restatement (Second) of Torts §409 (1965)); or
- caused by conditions outside the scope of the owner's or general contractor's own work, or beyond his control (*Thirion v Fredrickson & Watson Constr. Co.* (1961) 193 CA2d 299, 307, 14 CR 269, 273 (depression in highway that contractor had not yet begun to reconstruct); *Gibbons v City of San Bernardino* (1951) 108 CA2d 33, 35, 238 P2d 115, 116 (open manhole outside contractor's work area)).

There are, however, so many exceptions to the general rule that it is applied only if no good reason is found for departing from it. See *LaCount v Hensel Phelps Constr. Co.* (1978) 79 CA3d 754, 762, 145 CR 244. See Restatement §§410-429. See §§6.10-6.12.

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2. Bases for Liability

§6.10 a. Control; Hiring; Inspection; Supplying Defective Equipment

The hirer of an independent contractor or subcontractor may be liable to persons other than the hired contractor or the latter's employees for the hirer's own negligence in the following cases:

- Giving orders or directions or otherwise exercising any retained right of control (*Morehouse v Taubman Co.* (1970) 5 CA3d 548, 557, 85 CR 308; Restatement (Second) of Torts §§410, 414 (1965); see *Revels v Southern Cal. Edison Co.* (1952) 113 CA2d 673, 678, 248 P2d 986, 989 (dictum));
- Hiring an incompetent or careless contractor (Restatement §411; see *Risley v Lenwell* (1954) 129 CA2d 608, 622, 277 P2d 897, 907 (incompetent trucker));
- Providing unsafe equipment (Restatement §413); or
- Failing to inspect the work after completion (Restatement §412).

An owner's or general contractor's liability to employees of a hired independent contractor is, however, limited. See *Hooker v Department of Transp.* (2002) 27 C4th 198, 202, 115 CR2d 853 (hirer liable only when failure to exercise retained control of workplace safety "affirmatively contributed" to independent contractor's employee's injury or death); *Camargo v Tjaarda Dairy* (2001) 25 C4th 1235, 1241, 108 CR2d 617 (no "negligent hiring" liability to hiree's employee); *Padilla v Pomona College* (2008) 166 CA4th 661, 82 CR3d 869 (demolition subcontractor's employee failed to show owner's or general contractor's concealment of dangerous condition); *Madden v Summit View, Inc.* (2008) 165 CA4th 1267, 81 CR3d 601 (general contractor's failure to place safety railing around elevated patio not affirmative contribution to electrical subcontractor's employee's fall); *Millard v Biosources, Inc.* (2007) 156 CA4th 1338, 68 CR3d 177 (injured worker failed to show general contractor's affirmative contribution; failure not overcome by Lab C §6304.5 (see §6.4)); *Ruiz v Herman Weissker, Inc.* (2005) 130 CA4th 52, 29 CR3d 641 (agent hired by property owner to manage job not liable to independent contractor's employee who failed to present evidence that agent's negligence affirmatively contributed to causing injury); *Laico v Chevron U.S.A., Inc.* (2004) 123 CA4th 649, 659, 20 CR3d 307 (refinery owner that leased site to independent contractor to test gasoline not liable to contractor's employee who contracted blood disorder from benzene used in contractor's testing method); *Sheeler v Greystone Homes, Inc.* (2003) 113 CA4th 908, 6 CR3d 683 (general contractor not liable under nondelegable duty theory). But see *McKown v Wal-Mart Stores, Inc.* (2002) 27 C4th 219, 225, 115 CR2d 868 (hirer liable to hiree's employee for providing defective equipment that affirmatively contributed to employee's injury); *Browne v Turner Constr. Co.* (2005) 127 CA4th 1334, 1337, 26 CR3d 433 (property owner and general contractor could be liable for "abrupt withdrawal" of safety equipment previously provided—as negligent performance of voluntary undertaking—that affirmatively contributed to worker's injury); *Ray v Silverado Constructors* (2002) 98 CA4th 1120, 120 CR2d 251 (independent contractor's employee's widow made sufficient showing that hirer's conduct affirmatively contributed to employee's death to require reversal of summary judgment). For further discussion, see California Workers' Damages Practice §§9.8-9.13 (2d ed Cal CEB 2001).

Liability for supplying a worker with defective or unsafe equipment does not extend to a parent corporation that allegedly ordered a subsidiary corporation not to spend money to repair or replace defective equipment. *Waste Mgmt. Inc. v Superior Court* (*Peralta)* (2004) 119 CA4th 105, 13 CR3d 910 (also noted in §6.21).

The seller who commits the tort of misrepresentation when selling defective equipment to a worker's employer is not entitled to a CC §1431.2 (Proposition 51; see §1.69) percentage reduction of noneconomic damages. *Thomas v Duggins Constr. Co.* (2006) 139 CA4th 1105, 44 CR3d 66 (worker also established entitlement to CCP §998 enhanced costs and prejudgment interest).

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§6.11 b. Negligent Actor Was Employee, Not Independent Contractor

The respondeat superior doctrine imposes vicarious liability on an employer for injury caused by the negligence of an employee who was acting within the scope of employment (see generally §§4.45-4.57); thus, a general contractor's usual nonliability for the acts of an independent contractor (see §6.9) can sometimes be overcome by establishing that, in the circumstances, the actor was (or should be treated as) an employee rather than an independent contractor. The general rules for distinguishing an employee from an independent contractor are noted in §§4.46-4.52 and in California Workers' Compensation Practice §§2.75-2.77 (4th ed Cal CEB 2000) and in California Workers' Damages Practice §§4.22-4.24 (2d ed Cal CEB 2001).

In construction injury cases, a person who does not have a required contractor's license (or the employee of such a person) is conclusively presumed to be an employee of the hirer for whom the work that requires the license is being done, even if the person would have been found to be an independent contractor (or independent contractor's employee) under the usual criteria that distinguish an independent contractor from an employee. See Lab C §2750.5; *Sanders Constr. Co. v Cerda* (2009) 175 CA4th 430, 95 CR3d 911 (hirer of unlicensed subcontractor owed wages to latter's employees); *Mendoza v Brodeur* (2006) 142 CA4th 72, 47 CR3d 310 (unlicensed roofer deemed to be employee of homeowner, whose policy excluded him from workers' compensation coverage). But see *Chin v Namvar* (2008) 166 CA4th 994, 83 CR3d 294 (worker estopped from invoking Lab C §2750.5).

See Workers' Damages §§4.23-4.24 for cases involving the effect of Lab C §2750.5 on the workers' compensation exclusive remedy rule, and Workers' Comp §§18.20-18.47 on establishing liability to pay workers' compensation.

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Source: Torts/California Tort Guide/6 Construction Work/§6.12 c. Peculiar Risk Doctrine: Failure to Take Special Precautions for Dangerous Work

§6.12 c. Peculiar Risk Doctrine: Failure to Take Special Precautions for Dangerous Work

The "peculiar risk" exception to the usual rule (that the hirer of an independent contractor is not liable for injury caused by latter's negligence) states that: A person who hires an independent contractor to do work likely to create, during its progress, a peculiar unreasonable risk of harm to others unless special precautions are taken is liable for harm caused by either of the following:

- Absence of those precautions, if the hirer failed to provide for them in the contract or otherwise (Restatement (Second) of Torts §413 (1965)); or
- The contractor's failure to exercise reasonable care to take the precautions whether or not provided for in the contract (Restatement §416; see also Restatement §427).

The California Supreme Court, invoking policy considerations, has ruled that the peculiar (or special) risk doctrine no longer provides a basis for imposing liability on the hirer of an independent contractor for injury to the independent contractor's employee, at least in typical situations. *Privette v Superior Court (Contreras)* (1993) 5 C4th 689, 701, 21 CR2d 72 (homeowner who hired independent contractor to repair roof not liable for injury suffered by contractor's employee; availability of workers' compensation to injured employee obviates need to impose doctrine's form of vicarious liability on fault-free hirer); *Toland v Sunland Hous. Group, Inc.* (1998) 18 C4th 253, 74 CR2d 878 (confirming that *Privette* eliminates liability under both Restatement §§413 and 416, but declining to consider liability under Restatement §414, under which vicarious liability may be imposed on the hirer that has retained control over the operative details of the work). For further discussion, see California Workers' Damages Practice §§9.8-9.13 (2d ed Cal CEB 2001).

At least one court of appeal panel has concluded that the same obstacles to the recovery of damages by employees of independent contractors imposed by *Privette* also bar recovery by an individual independent contractor who has not secured workers' compensation coverage for himself or herself. *Michael v Denbeste Transp., Inc.* (2006) 137 CA4th 1082, 40 CR3d 777 (no evidence that hirer (1) negligently exercised control of work practices in a way that affirmatively contributed to injury or (2) concealed injury-causing hazardous condition not reasonably knowable by independent contractor).

NOTE: The California Supreme Court has granted review in *Tverberg v Fillner Constr. Co.* (review granted Feb. 25, 2009, S169753; superseded opinion at 168 CA4th 1278, 86 CR3d 265). The court of appeal had held that a self-employed independent contractor could recover damages from a negligent hirer despite the ruling in *Privette,* because workers' compensation benefits were not available to the injured contractor. The court of appeal characterized *Michael* as wrongly decided.

Hirers that are immunized from peculiar risk liability to an independent contractor's (*e.g.,* subcontractor's) employees include general contractors as well as the owners and lessees of the site where the work was being performed. *Lopez v University Partners* (1997) 54 CA4th 1117, 63 CR2d 359. But see *Barclay v Jesse M. Lange Distrib., Inc.* (2005) 129 CA4th 281, 285, 28 CR3d 242 (gasoline bulk plant owner could be liable to independent contractor's employee for breach of regulatory duty to provide fire extinguishers that increased severity of employee's injury).

Privette applies retroactively to cases not yet final when it was decided. *Redfeather v Chevron USA, Inc.* (1997) 57 CA4th 702, 67 CR2d 159. Further, *Privette* bars peculiar risk liability to an independent contractor's employee even when the independent contractor had agreed in writing to indemnify the hirer against such liability. *Redfeather v Chevron USA, Inc., supra.* See also *Whitford v Swinerton & Walberg Co.* (1995) 34 CA4th 1054, 40 CR2d 688 (trial court's erroneous imposition of peculiar risk liability on general contractor was inconsequential given court's application of Proposition 51 (CC §1431.2; see §1.69)).

Privette does not prevent use of the peculiar risk doctrine to impose vicarious liability on the hirer of an independent contractor for injury to a nonemployee. See 5 C4th at 701. See also, *e.g., Courtell v McEachen* (1959) 51 C2d 448, 456, 334 P2d 870 (child injured by burning debris). Nor does *Privette* appear to bar peculiar risk liability for property damage. See, *e.g., Henderson Bros. Stores v Smiley* (1981) 120 CA3d 903, 174 CR 875 (liability for fire damage to

adjacent property caused by overheated tar kettle).

NOTE: The *Privette* rationale could be applied to immunize a general contractor from liability to the employee of both (1) the subcontractor at a construction site whose negligent failure to take special precautions resulted in the injury and (2) another subcontractor on the project. On a related point, see *Zellers v Playa Pacifica, Ltd.* (1998) 61 CA4th 129, 70 CR2d 919, which extended workers' compensation exclusivity immunity to the hirer of an independent contractor whose contractor's license expired before its employee was injured.

Cases in which the peculiar risk doctrine may still be invoked (*e.g.,* cases involving nonemployees or property damage) continue to be governed by principles stated in "employee" cases that were partially overruled by *Privette*. For example, it has been established that a "peculiar" risk is not a strange or unusual risk, but rather a risk of the type ordinarily encountered in the particular type of work being done. See, *e.g., Aceves v Regal Pale Brewing Co.* (1979) 24 C3d 502, 508, 156 CR 41, overruled on other grounds in *Privette v Superior Court (Contreras)* (1993) 5 C4th 689, 702 n4, 21 CR2d 72 (policy bases for rule; demolition work involved special, recognizable risk of falling objects); *Griesel v Dart Indus.* (1979) 23 C3d 578, 585, 153 CR 213, overruled on other grounds in *Privette v Superior Court (Contreras)* (1993) 5 C4th 689, 702 n4, 21 CR2d 72 (error to instruct that trenching is ordinary and customary danger of construction work, not peculiar risk); *Jimenez v Pacific W. Constr. Co.* (1986) 185 CA3d 102, 229 CR 575 (digging nine-foot trench involves peculiar risk as matter of law); *White v Uniroyal, Inc.* (1984) 155 CA3d 1, 22, 202 CR 141, disapproved on other grounds at 8 C4th 580 (purchaser of chemical made to specifications by another firm is hirer of independent contractor and subject to liability for failure to require special precautions).

Situations in which peculiar risk liability has been held not to apply (in addition to the "employee" cases described in *Privette*) include the following:

- The injured person was himself the independent contractor who failed to take special precautions (*Torres v Reardon* (1992) 3 CA4th 831, 5 CR2d 52);
- The injury was caused by the "collateral" or "casual" negligence of the independent contractor's employees (*i.e.,* negligence in the operative detail of the work, as distinguished from the general plan or method to be followed) or negligence that was unusual, abnormal, or foreign to the normal or contemplated risks of doing the work, as distinguished from negligence that created a normal or contemplated risk (see, *e.g., Johnson v Tosco Corp.* (1991) 1 CA4th 123, 134, 1 CR2d 747 (subcontractor's employee's fall from single-stage scaffold due to other subcontractor's having supplied partially disassembled scaffold and employee's negligence); *Smith v Lucky Stores* (1976) 61 CA3d 826, 132 CR 628 (particular negligent act bore no relationship to dangerous work contemplated by contract); see also Restatement §426, and discussion in *LaCount v Hensel Phelps Constr. Co.* (1978) 79 CA3d 754, 764, 145 CR 244);
- The injury resulted from a worker's unforeseeable negligent act rather than from a risk inherent in the work method (*Salinero v Pon* (1981) 124 CA3d 120, 137, 177 CR 204 (co-worker's act); *Stark v Weeks Real Estate* (1979) 94 CA3d 965, 156 CR 701 (injured worker disabled power saw guard);
- The hirer did not know, and could not have known, of the special risk involved in the work (see *Hickey v Nulty* (1960) 182 CA2d 237, 245, 5 CR 914, 917);
- The general contractor hired a competent subcontractor and the subcontractor's employee was injured while doing work for which he was not trained, competent, or supervised (see *Addison v Susanville Lumber, Inc.* (1975) 47 CA3d 394, 402, 120 CR 737, 742 (risk that subcontractor will employ unskilled person is general, not peculiar));
- Suit against United States was brought under general admiralty law (see *Nelson v U.S.* (9th Cir 1980) 639 F2d 469 (injuries to employees of solvent independent contractor).

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Source: Torts/California Tort Guide/6 Construction Work/ D. Liability After Completion of Work/§6.13 1. Negligent Performance

D. Liability After Completion of Work

§6.13 1. Negligent Performance

CAVEAT: Property damage claims against contractors and others for defects in residences sold on or after January 1, 2003, are, with specified exceptions, subject to detailed restrictions and procedural requirements set out in CC §§895-945.5. See CC §§937-938. Specific provisions in these statutes may thus supersede the holdings in cases cited below and in §§6.14-6.15.

The acceptance of a completed structure by the owner generally insulates the builder from liability to others for injury caused by a patent condition of the property, even if the builder had negligently carried out the construction contract, except if the condition was latent and should have been known by the builder. *Jones v P.S. Dev. Co.* (2008) 166 CA4th 707, 82 CR3d 882 (after employer's acceptance of machine installed with visible protruding mounting bolts, "completed and accepted" doctrine precluded installers' liability to employee who tripped on bolt); *Sanchez v Swinerton & Walberg Co.* (1996) 47 CA4th 1461, 1466, 55 CR2d 415 (condition originally latent had become patent to the owner). Further, a contractor is not ordinarily liable after completion of the work for an injury caused solely by a defect or inadequacy in the owner's design. *Barnthouse v California Steel Bldgs. Co.* (1963) 215 CA2d 72, 74, 29 CR 835, 836. See Anno, 75 ALR 5th 413 (2000) (contractor's liability after work completed).

The cause of action for damage to real property accrues when the builder's act causes "immediate and permanent injury" to the property or when there is "actual and appreciable harm." See *Kusi v S.J. Amoroso Constr. Co.* (2000) 81 CA4th 995, 1005, 97 CR2d 294 (fourth owner of property lacked standing to sue when previous owners had taken steps to get defects corrected).

On the other hand, builders, contractors, engineers, and architects may be liable for injury or loss caused by negligent performance of the work, despite its completion, or lack of privity with the plaintiff. *Sabella v Wisler* (1963) 59 C2d 21, 28, 27 CR 689, 693 (builder liable for improper lot compaction); *Chance v Lawry's, Inc.* (1962) 58 C2d 368, 376, 24 CR 209, 213 (negligent repairs by contractor); *Stewart v Cox* (1961) 55 C2d 857, 861, 13 CR 521, 523 (subcontractor's defective guniting of swimming pool); *Dow v Holly Mfg. Co.* (1958) 49 C2d 720, 724, 321 P2d 736, 738 (general contractor responsible for defective heater); *Hale v Depaoli* (1948) 33 C2d 228, 230, 201 P2d 1, 2 (contractor's liability for improperly attached porch railing); *Stonegate Homeowners Ass'n v T.A. Staben* (2006) 144 CA4th 740, 50 CR3d 709 (retaining wall waterproofing and drain subcontractor not immune from liability to homeowners' association or to general contractor seeking indemnity); *Siegel v Anderson Homes, Inc.* (2004) 118 CA4th 994, 13 CR3d 462 (subsequent owners not barred by possibility that original owners could have sued for same defects absent showing that defects caused actual economic harm or loss to original owners); *Fisher v Morrison Homes, Inc.* (1980) 109 CA3d 131, 139, 167 CR 133 (developer's liability for injury resulting from negligent design and construction of roads and paths dedicated to public entity); *Diamond Springs Lime Co. v American River Constructors* (1971) 16 CA3d 581, 600, 94 CR 200 (negligent delay in completing dam that burst when partially constructed); *Oakes v McCarthy Co.* (1968) 267 CA2d 231, 249, 73 CR 127, 138 (improper compaction of fill under engineer's supervision); *Sweeney v Stone* (1968) 265 CA2d 693, 695, 71 CR 497, 498 (builder liable for failure to test soil); *Conolley v Bull* (1968) 258 CA2d 183, 197, 65 CR 689, 697 (builder liable for building on unstable land); *Montijo v Swift* (1963) 219 CA2d 351, 353, 33 CR 133, 135 (architect's liability for dangerous stairway). See Annos, 74 ALR5th 523 (1999) (building or construction contractor's tort liability for injury or damage after completion and acceptance of work; "completed and accepted" rule), 70 ALR5th 261 (1999) (exceptions to "completed and accepted" rule). But see *Weseloh Family Ltd. Partnership v K.L. Wessel Constr. Co.* (2004) 125 CA4th 152, 172, 22 CR3d 660 (engineers that designed retaining wall, employed by subcontractors, owed no duty (see §1.7) to property owner or general contractor).

Expert testimony may be needed to establish negligent construction when the issue is too complicated for lay jurors to decide. *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 702, 106 CR 1 (protection from flooding). See Anno, 84 ALR2d 69 7 (1962) (res ipsa loquitur).

A builder's liability for breaching a contract to build a sound house, even if characterized as a negligent breach of

contract, does not ordinarily include liability for the emotional distress suffered by those who purchased the house. See *Erlich v Menezes* (1999) 21 C4th 543, 87 CR2d 886.

Special limitations statutes may be used by contractors and others to escape liability for harm or loss resulting from patent (see CCP §337.1) or latent (see CCP §337.15) deficiencies in an improvement to real property. See discussion in §§6.19-6.20. Otherwise, the lapse of time between construction and injury or loss does not preclude a finding of negligence or causation. See *Hale v Depaoli* (1948) 33 C2d 228, 232, 201 P2d 1, 3; *Freeman v Mazzera* (1957) 150 CA2d 61, 64, 309 P2d 510, 512.

A contract to do construction work that requires arbitration of disputes but limits the types of awardable damages can be deemed unconscionable and thus unenforceable. See *Harper v Ultimo* (2003) 113 CA4th 1402, 7 CR3d 418 (contractor hired to stabilize soil and relevel pool allegedly damaged property and misled owners).

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§6.14 2. Strict Liability for Defects

The purchaser of a home or residential lot can sue a mass producer, seller, developer, contractor, or engineer on strict product liability grounds for damage caused by design and construction defects. *Jimenez v Superior Court* (2002) 29 C4th 473, 127 CR2d 614 (manufacturer of windows installed in mass-produced houses can be strictly liable for physical damages to other parts of the house resulting from defects in the windows); *Stearman v Centex Homes* (2000) 78 CA4th 611, 613, 92 CR2d 761 (contractor liable for cracks throughout house caused by defective foundation; "economic damages" restriction (see §11.24) not applicable, even though only damage was to house of which foundation was component part); *Gem Developers v Hallcraft Homes, Inc.* (1989) 213 CA3d 419, 261 CR 626 (former owner of defective lots, held strictly liable to consumers, could seek comparative equitable indemnity against original owner-developer); *Del Mar Beach Club Owners Ass'n v Imperial Contracting Co.* (1981) 123 CA3d 898, 913, 176 CR 886 (developers and builders strictly liable; architects, soil engineers, and structural engineers, having provided only services (advice) to developers could be liable only for negligence); *Kriegler v Eichler Homes, Inc.* (1969) 269 CA2d 224, 227, 74 CR 749, 752 (heating system failure). See also *Expressions at Rancho Niguel Ass'n v Ahmanson Devs., Inc.* (2001) 86 CA4th 1135, 103 CR2d 895 (comparative indemnity, not joint and several liability principles, applied to strictly liable settling defendants' indemnity claim against nonsettling defendant); *Hyman v Gordon* (1973) 35 CA3d 769, 111 CR 262 (garage fire due to defective placement of water heater); *Avner v Longridge Estates* (1969) 272 CA2d 607, 615, 77 CR 633, 639 (defective preparation of building lot).

Some defect in the product must be proved. See *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 704, 106 CR 1; Anno, 25 ALR4th 351 (1983) (strict liability for defects in building or land). See generally §11.37.

Strict product liability has not been extended beyond developers of mass-produced housing to reach subcontractors hired by the developer or the suppliers of components. *Casey v Overhead Door Corp.* (1999) 74 CA4th 112, 119, 87 CR2d 603, disapproved on a related point at 29 C4th 481 n1 (supplier of defective, leaking windows); *Monte Vista Dev. Corp. v Superior Court* (1991) 226 CA3d 1681, 277 CR 608 (installing subcontractor had purchased ceramic soap dish (that later broke) from tile company); *La Jolla Village Homeowners' Ass'n v Superior Court* (1989) 212 CA3d 1131, 1147, 261 CR 146, disapproved on a related point at 29 C4th 481 n1 (rule extends to all subcontractors whether they provided "service" or "product" unless they were essentially the developer, or part of joint venture, or had special relationship with buyers).

Strict liability is imposed only on "mass producers" of buildings or lots; negligence principles must be used against the isolated or occasional builder or seller. See *Oliver v Superior Court* (1989) 211 CA3d 86, 259 CR 160 (whether home was mass produced was fact question to be decided on case-by-case basis). Similarly, the roads and pathways that serve the properties in a development are not products placed in the stream of commerce for profit; negligence must be the basis for liability for their deficiencies in design and construction. See *Fisher v Morrison Homes, Inc.* (1980) 109 CA3d 131, 138 n2, 167 CR 133, discussed in §6.13. See also *United States Fin. v Sullivan* (1974) 37 CA3d 5, 18, 112 CR 18 (lender cannot base action for impairment of security interest on strict product liability); *Conolley v Bull* (1968) 258 CA2d 183, 195, 65 CR 689 (unstable land); *Halliday v Greene* (1966) 244 CA2d 482, 485, 53 CR 267 (unsafe staircase).

Special statutes of limitations apply to actions for harm and loss resulting from design or construction defects. See discussion in §§6.19-6.20. See also *Wagner v State* (1978) 86 CA3d 922, 927, 150 CR 489 (road intersection).

See Annos, 20 ALR5th 499 (1994) (financing agency's liability to purchasers for construction defects), 19 ALR5th 786 (1994) (title insurer's tort liability), 58 ALR2d 865 (1958) (contractor's liability to third person).

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§6.15 3. Breach of Warranty

A construction contract or other contract for labor and materials carries with it an implied warranty that the product will be fit for its intended use as to both workmanship and materials, and that the contractor's breach of that warranty may give rise to tort as well as contractual liability. See *Aced v Hobbs-Sesack Plumbing Co.* (1961) 55 C2d 573, 582, 12 CR 257 (heating system failure); *Mack v Hugh W. Comstock Assocs.* (1964) 225 CA2d 583, 587, 37 CR 466 (same); *Kuitems v Covell* (1951) 104 CA2d 482, 485, 231 P2d 552 (faulty roof structure). But see *McDonald v Sacramento Med. Found. Blood Bank* (1976) 62 CA3d 866, 871, 133 CR 444 (questioning *Aced*). See also *Eberhard v Bruhn* (1970) 13 CA3d 836, 839, 91 CR 915 (issue is same under negligence and warranty theories); *Presiding Bishop v Cavanaugh* (1963) 217 CA2d 492, 504, 32 CR 144 (contractor not ordinarily held to warrant suitability of products or materials designated by owner or architect).

The builder or seller of new construction may also be liable to the buyer for damages for breach of an implied warranty that the structure was designed and built in a reasonably workmanlike manner, if the buyer gives due notice of the breach. *Pollard v Saxe & Yolles Dev. Co.* (1974) 12 C3d 374, 380, 115 CR 648.

House buyers may maintain a class action against a developer and general contractor for breach of express and implied warranty. See *Hicks v Kaufman & Broad Home Corp.* (2001) 89 CA4th 908, 107 CR2d 761 (alleged defective concrete foundations).

NOTE: Although the supreme court had agreed to review the court of appeal decision in a later version of the above case, which ruled that an implied warranty cause of action was precluded by a conspicuous disclaimer in the sales contract, review was dismissed on February 1, 2006, after notice that the parties had settled the dispute. See *Hicks v Superior Court (Kaufman & Broad Home Corp.)* (review dismissed Feb. 1, 2006, and remanded to court of appeal; superseded opinion at 115 CA4th 77, 8 CR3d 703). Former CC §383, repealed in 2004, provided that a "common interest development" association had the requisite privity of contract to permit it to sue construction companies for breach of implied warranties. *Windham at Carmel Mountain Ranch Ass'n v Superior Court (Presley Cos.)* (2003) 109 CA4th 1162, 1172, 135 CR2d 834. See §11.66.

See Annos, 50 ALR3d 1071 (1973) (vendor of condominiums), 48 ALR3d 1027 (1973) (seller of real property), 25 ALR3d 383 (1969) (builder-vendor or other vendor).

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§6.16 II. HIGHWAY CONTRACTORS' LIABILITY TO TRAVELERS

A road contractor performing work on a street or highway has a duty to protect the traveling public from injury resulting from the work, including the duty to warn of construction hazards, if the road remains open to travel. *Hansen v Matich Corp.* (1965) 234 CA2d 129, 132, 44 CR 149, 151 (depression and rough area); *Thirion v Fredrickson & Watson Constr. Co.* (1961) 193 CA2d 299, 304, 14 CR 269, 272 (wet, loose gravel). See *Charles v Rice* (1959) 173 CA2d 599, 601, 343 P2d 760, 762 (steep cliff topped by soft shoulder at edge of road). See Anno, 3 ALR4th 770 (1981) (highway contractor's liability for injuries caused by materials or debris left on road during construction or repair).

A contractor who is still in control of the worksite can be liable for injury caused by dangerous conditions created by work on or along the roadway. See *Breslin v Fredrickson* (1957) 152 CA2d 780, 786, 313 P2d 597, 600 (unsafe shoulder; work had been completed 4 days before accident). On the other hand, a contractor whose work has not reached preexisting defects in the road is not liable. *Thirion v Fredrickson & Watson Constr. Co.* (1961) 193 CA2d 299, 307, 14 CR 269, 273.

A contractor that agreed to install traffic signals in a development is not liable for failing to do so absent proof that absence of the signals increased preexisting hazards. See *Paz v State* (2000) 22 C4th 550, 93 CR2d 703.

Existence of a dangerous roadway condition is usually a question of fact. *Thirion v Fredrickson & Watson Constr. Co., supra*; *Breslin v Fredrickson* (1957) 152 CA2d 780, 789, 313 P2d 597, 602. A finding that a dangerous condition existed may give rise to an inference of negligence under res ipsa loquitur (see §§1.35-1.40). *Hansen v Matich Corp.* (1965) 234 CA2d 129, 134, 44 CR 149, 152.

The work contract may provide that the contractor's responsibility continues until formal acceptance of the work by the public entity. *Breslin v Fredrickson, supra*. See §8.10 on a public entity's nondelegable duty.

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III. DEFENSES

§6.17 A. Missing or Inadequate Certificate of Merit

An architect, engineer, or surveyor sued (or cross-complained against) for professional negligence can obtain a dismissal if the plaintiff's (or cross-complainant's) attorney has not executed and served a prescribed certificate of merit. CCP §411.35 (need to seek consultant's opinion on negligence). See *Guinn v Dotson* (1994) 23 CA4th 262, 28 CR2d 409 (dismissal when allegations of complaint in conflict with assertions in plaintiff's attorney's certificate that plaintiffs were relying solely on res ipsa loquitur). But see *Price v Dames & Moore* (2001) 92 CA4th 355, 112 CR2d 65 (plaintiff that filed certificate that was defective because not signed by attorney must be given opportunity to cure defect).

For discussion, with forms, of the contents of the usual certificate, and the alternative certificate when plaintiffs rely solely on the limited theories of res ipsa loquitur or failure to inform, see California Civil Procedure Before Trial §§9.33-9.34, 9.82-9.85 (4th ed Cal CEB 2004).

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§6.18 B. Statutes of Limitations

From January 1, 2003, personal injury and wrongful death claims are governed by the 2-year limitations period specified in CCP §335.1. See Note in §2.23 on the retroactivity of the 2-year period.

Lawsuits seeking damages for diminution in the value of a structure caused by a construction defect must be filed within 3 or 4 years after the plaintiff discovers the defect, or should have done so, depending on the theory of recovery. CCP §§337(1), 338(b), (c). *Lantzy v Centex Homes* (2003) 31 C4th 363, 366, 2 CR3d 655. The limitations period for a suit alleging breach of warranty is 4 years from the date the plaintiff suspected, or should have suspected, that an injury or loss was caused by someone's wrongdoing or, under conditions specified in §6.19, from the substantial completion of the construction. See *Mills v Forestex Co.* (2003) 108 CA4th 625, 650, 134 CR2d 273 (plaintiff alleged no factual basis for tolling statute or for estopping defendant from asserting defense).

In addition to time limitations that are based on the nature of the loss or harm sued for, there are limitations statutes that sometimes apply to lawsuits against contractors, developers, and others involved in construction work. See §§6.19-6.20. See generally *Landale-Cameron Court, Inc. v Ahonen* (2007) 155 CA4th 1401, 66 CR3d 776 (letter by attorney for homeowners' association to contractor, invoking statutory tolling provision, extended CCP §338's 3-year period); *Kirby v Albert D. Seeno Constr. Co.* (1992) 11 CA4th 1059, 14 CR2d 604 (application of 3-year limitations period in CCP §338(b), (d) in homeowners' action against builder for damage resulting from soil subsidence). See also *Roger E. Smith, Inc. v SHN Consulting Eng'rs & Geologists, Inc.* (2001) 89 CA4th 638, 107 CR2d 424 (2-year statute barred general contractor's suit against architect and construction manager for economic loss resulting from alleged professional malpractice during construction). See Anno, 5 ALR 6th 497 (2005) (validity of time limitations on claims alleging building defects).

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§6.19 1. Patent Deficiencies: 4 Years

Under CCP §337.1, certain specified contractors and others involved in making "an improvement to real property" can obtain the dismissal of a lawsuit that seeks damages for personal injury, wrongful death, injury to real or personal property, or other loss by establishing, basically, that (a) the injury resulted from a "patent" deficiency in the design, specifications, surveying planning, supervision or observation of construction, or construction of the improvement, (b) the suit was not filed within 4 years (or in specified cases, up to 5 years) after "substantial completion" of the improvement, and (c) the property is not an "owner-occupied single-unit residence." See *Robinson v Chin & Hensolt* (2002) 98 CA4th 702, 120 CR2d 49 (statute provided defense to personal injury claims by cable car operators alleging defective design of cable car turnarounds renovated 15 years earlier); *Tomko Woll Group Architects, Inc. v Superior Court* (1996) 46 CA4th 1326, 54 CR2d 300 (visibly uneven paving stones were patent defect). See §6.20 for related discussion of the CCP §337.15 10-year period for "latent" deficiencies.

NOTE: Code of Civil Procedure §337.1 does not apply to property damage claims against contractors and others for defects in residences sold on or after January 1, 2003; such claims are subject to detailed restrictions and procedural requirements set out in CC §§895-945.5. See CC §941, which imposes a limit of 10 years after substantial completion.

Whether a condition is patent, or latent, is determined by an objective "average person" test, not a subjective one. See *Renown, Inc. v Hensel Phelps Constr. Co.* (1984) 154 CA3d 413, 201 CR 242 (roofing defects were patent to owners who employed full-time construction quality auditor); *Mattingly v Anthony Indus.* (1980) 109 CA3d 506, 511, 167 CR 292 (lack of fence around apartment-complex swimming pool was patent defect). See also *Geertz v Ausonio* (1992) 4 CA4th 1363, 6 CR2d 318 (whether lack of overflow drainage system was patent defect is question of fact); *Salinero v Pon* (1981) 124 CA3d 120, 127, 177 CR 204 (CCP §337.1 is constitutional). A readily apparent deficiency may nonetheless be latent, not patent, if the person harmed could not have ascertained the nature of the deficiency by a reasonable inspection. See *Baker v Walker & Walker* (1982) 133 CA3d 746, 759, 184 CR 245 (cause of irregular temperature fluctuations in building was latent deficiency, not barred by 4-year limitation).

The CCP §337.1 4-year period does not bar a strict product liability cause of action against the manufacturer of a product that was incorporated into a building. See *Baker v Walker & Walker* (1982) 133 CA3d 746, 184 CR 245 (manufacturer of heating/cooling units; 10-year bar also denied). On the other hand, a contractor who installed a swimming pool has been permitted to use §337.1 to block a lawsuit. See *Mattingly v Anthony Indus., supra*. See also *Stoneson Dev. Corp. v Superior Court* (1987) 197 CA3d 178, 242 CR 721 (although construction project itself was "product" for some purposes, CCP §337.15 10-year period barred strict liability cause of action).

The CCP §337.1 4-year period (like the CCP §337.15 10-year period) applies separately to each separate area of damage. *Winston Square Homeowner's Ass'n v Centex W., Inc.* (1989) 213 CA3d 282, 261 CR 605 (contractor's attempt to repair one area of damage did not toll statute on other distinct areas).

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Source: Torts/California Tort Guide/6 Construction Work/§6.20 2. Latent Deficiencies: 10 Years

§6.20 2. Latent Deficiencies: 10 Years

Personal injury and wrongful death lawsuits are not subject to being barred by the CCP §337.15 10-year limitations period on suits for "latent" deficiencies, although this statute may be invoked in "injury to property" cases by the same contractors and other persons specified in CCP §337.1 (see §6.19), as well as by developers and their sureties. *Martinez v Traubner* (1982) 32 C3d 755, 187 CR 251 (worker injured while repairing roof 19 years after completion of house could sue builder for injuries caused by collapse of roof because of latent defect). See *Grimmer v Harbor Towers* (1982) 133 CA3d 88, 183 CR 634 (§337.15 does not bar indemnity claim against builder, by owner liable to pay personal injury damages to tenant). For injury to real or personal property or loss of value, §337.15 applies to both tort and contract actions. *Mosely v Abrams* (1985) 170 CA3d 355, 216 CR 40.

NOTE: Code of Civil Procedure §337.15 does not apply to property damage claims against contractors and others for defects in residences sold on or after January 1, 2003; such claims are subject to detailed restrictions and procedural requirements set out in CC §§895-945.5. See CC §941, which imposes a limit of 10 years after substantial completion.

The cause of action for property damage caused by latent construction defects accrues when the plaintiff becomes aware that the defendant's fault caused the damage. *Allen v Sundean* (1982) 137 CA3d 216, 222, 186 CR 863. As a statute of repose, however, the 10-year period begins to run against a particular defendant, when that defendant's work on the improvement was substantially complete, not when the improvement itself was completed. *Gaggero v County of San Diego* (2004) 124 CA4th 609, 21 CR3d 388 (claim for damages from subsidence of landfill against county that had sold property more than 10 years earlier); *Nelson v Gorian & Assocs., Inc.* (1998) 61 CA4th 93, 71 CR2d 345 (period in soil subsidence action began to run on substantial completion of grader's work, not later when certificate of completion of tract signed); *Industrial Risk Insurers v Rust Eng'g Co.* (1991) 232 CA3d 1038, 283 CR 873 (latent defect suit over exploding boiler was time barred). See CCP §337.15(g) on "substantial completion." See Anno, 33 ALR5th 1 (1995) (applying "discovery rule" to toll statute of limitations against suits relating to building and construction contracts).

The 10-year period is not extended (equitably tolled) by a defendant's promises or attempts to repair, although a defendant whose conduct induces the plaintiff to refrain from filing suit within the 10-year period may be estopped from asserting the limitations period as a defense. *Lantzy v Centex Homes* (2003) 31 C4th 363, 383, 2 CR3d 655. See *Mills v Forestex Co.* (2003) 108 CA4th 625, 657, 134 CR2d 273 (plaintiff alleged no factual basis for tolling statute or for estopping defendant from asserting defense). As a statute of repose, CCP §337.15 is not subject to the tolling provisions of CCP §356 for a bankruptcy stay. *Inco Dev. Corp. v Superior Court (Haynes)* (2005) 131 CA4th 1014, 31 CR3d 872.

The 10-year statute does not preclude a construction defect suit against a general contractor or developer charged with willful misconduct. *Acosta v Glenfed Dev. Corp.* (2005) 128 CA4th 1278, 28 CR3d 92.

On additional points that have arisen under CCP §337.15, see *Valley Circle Estates v VTN Consol., Inc.* (1983) 33 C3d 604, 189 CR 871 (under CCP §337.15(c), transactionally related cross-complaint may be filed after 10 years in suit for damage from soil subsidence originally filed within 10 years); *Fleck v Bollinger Home Corp.* (1997) 54 CA4th 926, 932, 63 CR2d 407 (defendant's assignment of equitable indemnity claim which, under CCP §337.15(c), was not barred to plaintiff who would otherwise have been barred by CCP §337.15); *Grange Debris Box & Wrecking Co. v Superior Court* (1993) 16 CA4th 1349, 1355, 20 CR2d 515, disapproved on other grounds at 31 C4th 367 (under CCP §337.15(e), entity in possession or control may not assert defense); *Winston Square Homeowner's Ass'n v Centex W., Inc.* (1989) 213 CA3d 282, 261 CR 605 (discussed in §6.19); *Stoneson Dev. Corp. v Superior Court* (1987) 197 CA3d 178, 242 CR 721 (discussed in §6.19); *Felburg v Don Wilson Builders* (1983) 142 CA3d 383, 391, 191 CR 92 (under CCP §337.15(f), limitation does not apply to action for fraudulent concealment of defect; builder allegedly knew that house was built over sump on old oil field); *Baker v Walker & Walker* (1982) 133 CA3d 746, 184 CR 245 (discussed in §6.19); *Barnhouse v City of Pinole* (1982) 133 CA3d 171, 183 CR 881 (§337.15 is constitutional; applies to breach of warranty cause of action but not to action based on fraudulent concealment); *Liptak v Diane Apartments, Inc.* (1980) 109 CA3d 762, 167 CR 440 (suit for property damage from alleged faulty grading, filling, and maintenance of slope).

See Annos, 12 ALR4th 866 (1982) (limitations on soil stability actions), 10 ALR4th 385 (1981) (subsequent purchasers' actions for latent defects).

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§6.21 C. Employer-Employee Relationship (Workers' Compensation Exclusivity)

A contractor or construction site owner can defend a lawsuit for civil damages by showing that the injured person was the defendant's employee, who, under the circumstances of the injury, is entitled to workers' compensation benefits. See Lab C §3602 (if conditions of compensation exist, the right to such compensation is exclusive remedy against employer for employee injury or death). For a comprehensive discussion of this "exclusive remedy rule," and the exceptions to it, see California Workers' Damages Practice, chap 4 (2d ed Cal CEB 2001) with latest update, which also discusses application of the workers' compensation exclusivity defense to claims against the injured worker's coemployees and the employer's workers' compensation insurer.

The workers' compensation exclusive remedy defense is not available to a dwelling owner sued by a contractor's employee injured before he or she had worked the hours specified in Lab C §§3351(d) and 3352(h). *Zaragoza v Ibarra* (2009) 174 CA4th 1012, 1016, 95 CR3d 64 (no showing of owners' lack of ordinary care).

Allegations that a parent corporation ordered a subsidiary corporation not to spend money to repair or replace defective equipment are insufficient to make the parent liable to the widow of a subsidiary employee whose death resulted from using defective equipment. *Waste Mgmt. Inc. v Superior Court (Peralta)* (2004) 119 CA4th 105, 13 CR3d 910 (widow limited to workers' compensation death benefit paid by subsidiary (or its insurer); sufficient parental control of subsidiary's budget to make parent liable would also be sufficient to give parent exclusivity immunity).

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§6.22 D. Contributory Negligence; Causation

As in any tort case, if the plaintiff proves that the negligence of a contractor or owner was the proximate cause of injuries to a worker or anyone else at a construction site, the plaintiff's damages recovery is reduced in proportion to the amount of the injured person's contributory negligence (and willful misconduct) compared with the causative legal fault of the defendant and others. See discussion in §§1.42-1.44. See *Elder v Pacific Tel. & Tel. Co.* (1977) 66 CA3d 650, 657, 136 CR 203 (without proof of defendant's negligence, or of proximate cause, there is nothing to which plaintiff's fault can be compared). Contributory negligence includes conduct that was formerly characterized as assumption of risk. See §6.23.

Sometimes the conduct of a person injured at a construction site can be found to have broken the causal chain between other workers' negligence and the sued-on injury (*i.e.,* that the conduct was more than merely the contributory fault that would have proportionally reduced damages). See *Jonkey v Carignan Constr. Co.* (2006) 139 CA4th 20, 42 CR3d 399 (subcontractor so intent on cell phone conversation as he walked by scaffold being dismantled that he was hit by falling plank).

Under Lab C §3708, however, the injured worker's contributory or comparative negligence cannot be asserted as a defense if his or her direct employer failed to secure the payment of (or insure for) workers' compensation. *Logan v Masters* (1981) 120 CA3d 145, 174 CR 465.

Because a worker needs to give attention to the work, the amount of care for his or her own safety that must be used by a person who must work under possibly unsafe or dangerous conditions may well be less than would otherwise be required. *Gyerman v United States Lines Co.* (1972) 7 C3d 488, 501, 102 CR 795; *Pike v Frank G. Hough Co.* (1970) 2 C3d 465, 473, 85 CR 629.

Contributory negligence may be asserted as a defense (*Scott v John E. Branagh & Son* (1965) 234 CA2d 435, 440, 44 CR 384, 387), even if the contractor violated a safety regulation (*Mula v Meyer* (1955) 132 CA2d 279, 284, 282 P2d 107, 110). But without notice to the contrary, a worker may assume that a safe workplace has been provided. *Florez v Groom Dev. Co.* (1959) 53 C2d 347, 359, 1 CR 840, 847; *Johnson v Nicholson* (1958) 159 CA2d 395, 410, 324 P2d 307, 316.

That a worker proceeds to do a job in which danger is inherent is not necessarily contributory negligence. See *Austin v Riverside Portland Cement Co.* (1955) 44 C2d 225, 239, 282 P2d 69, 76 (using crane near power lines); *Young v Aro Corp.* (1973) 36 CA3d 240, 244, 111 CR 535 (employer habituated worker to using overspeeding grinder); *Lokey v Pine Mountain Lumber Co.* (1962) 205 CA2d 522, 533, 23 CR 293, 300 (unloading logging truck); *Di Muro v Masterson Trusafe Steel Scaffold Co.* (1961) 193 CA2d 784, 797, 14 CR 551, 558 (using scaffold without guardrails).

A worker could be found contributorily negligent for failing to report a known dangerous condition if such a report is customary or contemplated by a union agreement. *Gyerman v United States Lines Co., supra*. It is the defendant's burden, however, to prove that such negligence was a proximate cause of the injuries. 7 C3d at 503.

A worker's violation of a safety order enacted for his protection does not in itself constitute contributory negligence. *Mason v Case* (1963) 220 CA2d 170, 181, 33 CR 710, 716 (failure to secure ladder against slippage); *Lokey v Pine Mountain Lumber Co.* (1962) 205 CA2d 522, 528, 23 CR 293, 297 (failure to attach safeguard while unloading logs). This is true even for workers who are supervisors. *Alber v Owens* (1967) 66 C2d 790, 799, 59 CR 117, 123.

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§6.23 E. Assumption of Risk; Firefighter's Rule

Workers who undertake dangerous tasks are not ordinarily barred from recovering damages by the primary assumption of risk concept (see §1.46), although their conduct may sometimes be contributory fault that proportionally reduces their damages. *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 34 CR2d 630 (oilfield workers injured in explosion while trying to cap leak negligently caused by others not barred by either assumption of risk or firefighter's rule); *Marquez v Mainframe* (1996) 42 CA4th 881, 50 CR2d 34 (private security guard who slipped in puddle while making rounds; see §1.55); *Donohue v San Francisco Hous. Auth.* (1993) 16 CA4th 658, 20 CR2d 148 (firefighter injured during building inspection could sue owner that created dangerous condition; see §10.16); *Milwaukee Elec. Tool Corp. v Superior Court* (1993) 15 CA4th 547, 19 CR2d 24 (injured worker could sue manufacturer for strict product liability even though he knew power tool might bind; see §10.44).

NOTE: The primary assumption of risk concept has been applied by two court of appeal panels in nonconstruction work injury cases to bar recovery by an injured worker. See *Dyer v Superior Court* (1997) 56 CA4th 61, 65 CR2d 85 (tow truck driver denied recovery from motorist whose alleged negligence caused car to stall on highway, bringing tow truck driver to scene where he was injured by another car; see Note in §4.79). See also *Herrle v Estate of Marshall* (1996) 45 CA4th 1761, 53 CR2d 713 (nurse's aide barred from suing estate of demented patient who struck aide; aide, by working with senile and Alzheimer's patients, assumed the very risk that led to her injury; dissenting justice calls result "bad law and bad policy").

Even before adoption of the comparative fault system, assumption of risk was seldom a defense to an action by an injured worker, for the following reasons:

- The defendant was required to prove the worker's actual knowledge of the specific hazard (*Timmons v Assembly of God Church* (1974) 40 CA3d 31, 42, 115 CR 917; *Kadelbach v Amaral* (1973) 31 CA3d 814, 824, 107 CR 720; *Guerrero v Westgate Lumber Co.* (1958) 164 CA2d 612, 618, 331 P2d 107, 110; see *Vierra v Fifth Ave. Rental Serv.* (1963) 60 C2d 266, 271, 32 CR 193, 196 (injury to bystander)); and
- A worker could not assume the risk of another's violation of a safety regulation (*Judkins v Aromalene, Inc.* (1961) 194 CA2d 48, 54, 14 CR 623, 627 (failure to obtain fire permit); *Maia v Security Lumber & Concrete Co.* (1958) 160 CA2d 16, 20, 324 P2d 657, 660 (failure to render machinery inoperative for repair)).

The firefighter's rule is a type of assumption of risk that may be raised to bar recovery by a firefighter, peace officer, or "emergency medical personnel" employed by public agencies from recovering damages from the person whose negligent conduct created the occasion for the public employee's presence at the injury scene. See discussion in §1.55.

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§6.24 F. Employer's Concurrent Fault

A general contractor, owner, or other "third party" can reduce its own liability to an injured worker and to that worker's direct employer (the employer responsible for the injured worker's workers' compensation benefits) by proving that concurrent fault attributable to the employer (including the negligence of other workers employed by the same employer) contributed to causing the worker's injuries. Basically, such a third party's liability is reduced in proportion to the fault percentage attributed to the employer up to the dollar amount of the workers' compensation paid by that employer. For discussion of this damages reduction, see California Workers' Damages Practice §§9.6-9.7 (2d ed Cal CEB 2001) with latest update. See also §6.12 on peculiar risk liability restrictions.

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§6.25 G. Other Tortfeasors' Fault (Proposition 51)

As noted in §1.69, causative fault assigned by the trier of fact to tortfeasors other than defendants still in the case, the injured person, and that person's employer may, under Proposition 51 (CC §1431.2), proportionally reduce the remaining defendants' liability for noneconomic damages.

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§6.26 IV. INDEMNIFICATION

General contractors may use indemnity agreements to (1) shift their liability for injured workers' injury or death and for property damage to subcontractors and others or (2) obtain reimbursement for damages paid. See *Crawford v Weather Shield Mfg. Inc.* (2008) 44 C4th 541, 79 CR3d 721 (subcontractor responsible for construction defects required to indemnify general contractor and, under CC §2778(4), to defend suits against general contractor); *Gonzales v R.J. Novick Constr. Co.* (1978) 20 C3d 798, 807, 144 CR 408 (general contractor, liable as third party, was entitled to indemnity from subcontractor who was injured worker's employer). See also *Heppler v J.M. Peters Co.* (1999) 73 CA4th 1265, 87 CR2d 497 (construction defect litigation; proof of subcontractor negligence needed to trigger subcontractor liability under particular general contractor/subcontractor indemnity agreements). But see *Newhall Land & Farming Co. v McCarthy Constr.* (2001) 88 CA4th 769, 106 CR2d 10 (no factual basis for developer sued for construction defects to seek equitable indemnity from company later hired by owners to correct defects charged to developer).

NOTE: Civil Code §2782 declares unenforceable certain agreements affecting residential construction contracts that purport to require a subcontractor to indemnify a general contractor against liability for claims of construction defects or other damage to property.

Indemnity from the employer of the injured worker, however, must be based on a written agreement executed before the injury. Lab C §3864; *E.B. Wills Co. v Superior Court* (1976) 56 CA3d 650, 654, 128 CR 541. See *Regional Steel Corp. v Superior Court* (1994) 25 CA4th 525, 32 CR2d 417 (existence of express indemnity agreement between general contractor and subcontractor precluded comparative (equitable) indemnity); *Solano Concrete Co. v Lund Constr. Co.* (1976) 64 CA3d 572, 134 CR 552 (agreement signed after injury ineffective).

The terms of the particular indemnity agreement, not equitable indemnity concepts, determine whether the general contractor is entitled to be indemnified even though personally negligent, whether "passively" or "actively." See *Rossmoor Sanitation, Inc. v Pylon, Inc.* (1975) 13 C3d 622, 628, 119 CR 449; *McCrary Constr. Co. v Metal Deck Specialists, Inc.* (2005) 133 CA4th 1528, 35 CR3d 624 (general contractor's active negligence precluded indemnity under "general" indemnity clauses in subcontracts regardless of subcontractors' negligence); *Centex Golden Constr. Co. v Dale Tile Co.* (2000) 78 CA4th 992, 93 CR2d 259 (agreement required nonnegligent subcontractor to indemnify general contractor); *Continental Heller Corp. v Amtech Mechanical Serv., Inc.* (1997) 53 CA4th 500, 61 CR2d 668. On types of written agreements, see *E.L. White, Inc. v City of Huntington Beach* (1978) 21 C3d 497, 507, 146 CR 614. See also *National Union Fire Ins. Co. v Nationwide Ins. Co.* (1999) 69 CA4th 709, 82 CR2d 16 (finding that general contractor's "sole negligence" caused injury to subcontractor's employee negated indemnity provisions of subcontract).

The right of a construction site owner to be indemnified by the general contractor for damages paid to a subcontractor's employee may be expressly provided for by contract, may be implied from an agreement that does not mention indemnity, or may arise from the equities of particular circumstances. See *Rossmoor Sanitation, Inc. v Pylon, Inc., supra*. On the effect on a subcontractor's indemnity liability for construction defects of the developer's and general contractor's settlements with the a homeowners' association, see *Gouvis Eng'g v Superior Court* (1995) 37 CA4th 642, 43 CR2d 785.

For a more comprehensive discussion of the effect of indemnity agreements on the liability of general contractors and owners, see California Workers' Damages Practice §§9.26-9.37 (2d ed Cal CEB 2001).

On indemnification among construction participants for commercial losses, see §1.68.

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7

Electricity

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I. LIABILITY

§7.1 A. Basic Duty: Care Commensurate With Danger

A public utility is not an insurer of the property into which it introduces its product (electricity, gas, or water) unless it agrees by express contract to insure or indemnify for specified risks. See *Lowenschuss v Southern Cal. Gas Co.* (1992) 11 CA4th 496, 500, 14 CR2d 59 (utility not liable for failing to shut off gas to house in path of major fire); *Krongos v PG&E* (1992) 7 CA4th 387, 396, 9 CR2d 124 (power company has duty to use reasonable care in stringing lines so as not to unreasonably expose others to injury; no breach of duty, as matter of law, when line was more than 25 feet above ground and equipped with warning signs). See Anno, 34 ALR5th 1 (1995) (res ipsa loquitur in gas leak cases).

Nor is the maintenance of power lines or the delivery of electricity an ultrahazardous activity for which liability without fault may be imposed. *McKenzie v PG&E* (1962) 200 CA2d 731, 736, 19 CR 628, 631, disapproved on other grounds at 58 C2d 299 (also rejecting trespass theory); *Pierce v PG&E* (1985) 166 CA3d 68, 85, 212 CR 283 (7000 volts introduced into house wiring due to poor insulation and ground wire unlawfully connecting electrical system to propane gas system; ultrahazardous activity liability rejected).

On the other hand, because of the high risk of serious injury from escaping electricity, a power company or person maintaining electric wires must use increased care proportionate to the danger. *Polk v City of Los Angeles* (1945) 26 C2d 519, 525, 159 P2d 931, 934. In other words, the plaintiff must show that the defendant failed to use ordinary care in circumstances of high danger. *McKenzie v PG&E, supra*. See §7.6 on strict product liability.

Similarly, a company that supplies gas to a house in which the pipes and valves are perceptibly inadequate may be liable for negligence. See *Ambriz v Petrolane Ltd.* (1957) 49 C2d 470, 319 P2d 1. Conversely, a company that supplies gas to a house with a well-functioning water heater (with, however, a pilot light that is less than 18 inches from the garage floor) is not liable for an explosion resulting from the nearby use of volatile substances. See *Salazar v Southern Cal. Gas Co.* (1997) 54 CA4th 1370, 63 CR2d 522. See also *Williams v Southern Cal. Gas Co.* (2009) 176 CA4th 591, 98 CR3d 258 (no duty of care imposed on gas company by evidence that its employees should have seen discoloration on wall furnace indicating it was not venting properly).

General negligence principles (see chap 1) apply to tort actions against power companies for injuries caused other than by electricity. See Annos, 111 ALR5th 579 (2003) (public utility or entity liability for injury resulting from inoperative, malfunctioning, or defective streetlight); 8 ALR5th 177 (1992) (collision with guy wire); 97 ALR2d 664, 667 (1964) (fall of pole).

A public utility subject to regulation by the Public Utilities Commission may obtain dismissal of certain damages suits on the ground that they are barred by the preemption provisions of Pub Util C §1759. See, *e.g., San Diego Gas & Elec. Co. v Superior Court* (Covalt) (1996) 13 C4th 893, 55 CR2d 724 (adjoining landowners' claims they were damaged by electric and magnetic fields (EMFs)); *Ford v PG&E* (1997) 60 CA4th 696, 70 CR2d 359 (employee claiming occupational injury from EMFs). See also *Hartwell Corp. v Superior Court* (2002) 27 C4th 256, 115 CR2d 874 (no preemption of damages claims alleging violation of federal and state drinking water standards, but certain other claims against regulated water providers preempted). But see *Leslie v Superior Court* (1999) 73 CA4th 1042, 87 CR2d 313 (no PUC preemption of property owners' suit alleging damage from utility's grading of roads to access transmission lines). See Anno, 104 ALR5th 503 (2002) (effect of evidence of electromagnetic fields on personal injury and property damage claims).

Not covered in this chapter are claims that a utility's faulty equipment caused a fire that damaged property in a way that amounted to inverse condemnation (see *Barham v Southern Cal. Edison Co.* (1999) 74 CA4th 744, 88 CR2d 424) or that a utility's failure to maintain highway illumination caused injury (see *White v Southern Cal. Edison Co.* (1994) 25 CA4th 442, 30 CR2d 431). See also Annos, 46 ALR5th 423 (1997) (liability to nonemployees for injury resulting from beginning or resuming electric service); 15 ALR4th 1148 (1982) (liability of person other than power company or its employee for interruption of power), 10 ALR4th 854 (1981) (liability for defective transformer or other equipment), 99 ALR3d 628 (1980) (telephone company liability for noise or electric charge transmitted over line).

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B. Power Lines

§7.2 1. Insulation; Clearance

In any place where a reasonable probability exists that a person might be injured from contact with electric wires, those in control of the electricity or the wires must do the following:

- Install and maintain proper insulation (*Polk v City of Los Angeles* (1945) 26 C2d 519, 525, 159 P2d 931, 934; *Couch v PG&E* (1947) 80 CA2d 857, 864, 183 P2d 91, 95 (interior wires));
- Place and keep the wires sufficiently clear of the ground, buildings, and combustibles (*Dunn v PG&E* (1954) 43 C2d 265, 275, 272 P2d 745, 750; *Scally v PG&E* (1972) 23 CA3d 806, 815, 100 CR 501); or guard the wires in some other manner (*Lozano v PG&E* (1945) 70 CA2d 415, 422, 161 P2d 74).

See Annos, 95 ALR5th 29 (2002) (utility liability to nonemployee for sagging or downed power line); 49 ALR5th 659 (1997) (owner's liability when wire, pole, or structure hit by airplane); 33 ALR4th 809 (1984) (injury or death from bringing object in touch with or close to electric line), 91 ALR3d 616 (1979) (injury to child who touches wire while climbing tree), 82 ALR3d 113 (1978) (liability for injury from contact of radio or television antenna with electric line), 55 ALR2d 129 (1957) (liability for injury from electrification of guy wire).

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Source: Torts/California Tort Guide/7 Electricity/§7.3 2. Inspection of Lines; Constructive Notice of Defects and Changes

§7.3 2. Inspection of Lines; Constructive Notice of Defects and Changes

A power company must make reasonably frequent and thorough inspections of its lines to keep them safe from the following:

- Natural deterioration (*Polk v City of Los Angeles* (1945) 26 C2d 519, 525, 159 P2d 931, 934);
- Foreseeable uses of the underlying or adjacent premises (*McKenzie v PG&E* (1962) 200 CA2d 731, 738, 19 CR 628, 632, disapproved on other grounds at 58 C2d 299); and
- Changed conditions that make them hazardous (*Dunn v PG&E* (1954) 43 C2d 265, 275, 272 P2d 745, 750).

A power company is charged with notice of defective or dangerous conditions that diligent inspection would have revealed. *Lozano v PG&E* (1945) 70 CA2d 415, 423, 161 P2d 74, 79. But see *Perrine v PG&E* (1960) 186 CA2d 442, 447, 9 CR 45, 48 (duty discharged by moving lines away from new building); *Benard v Vorlander* (1948) 87 CA2d 436, 442, 197 P2d 42, 46 (no duty to anticipate that workmen on building would extend long steel rods).

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§7.4 3. Protecting Against Foreseeable Risks

A person (or entity) in control of electric lines must protect against the possibility of injury from reasonably foreseeable uses of the underlying premises by the property owner and the owner's guests and employees. See, *e.g., Mark v PG&E* (1972) 7 C3d 170, 178, 101 CR 908 (tenant standing on fire escape unscrewed streetlight bulb); *Pappert v San Diego Gas & Elec. Co.* (1982) 137 CA3d 205, 211, 186 CR 847 (property owner electrocuted by uninsulated, high-voltage line while trimming tree that company had not trimmed; owner's acts not superseding cause). See also *Nevis v PG&E* (1954) 43 C2d 626, 631, 275 P2d 761 (hay derrick touched overhead wires); *Polk v City of Los Angeles* (1945) 26 C2d 519, 526, 159 P2d 931 (trimming trees around wires); *McCormick v Great W. Power Co.* (1932) 214 C 658, 663, 8 P2d 145 (ironworker on building touched wires); *United Pac. Ins. Co. v Southern Cal. Edison Co.* (1985) 163 CA3d 700, 710, 209 CR 819 (adequacy of foreseeability instruction when errant kite string pulled two conductors together, causing arcing and fire that destroyed 200 houses); *Lozano v PG&E* (1945) 70 CA2d 415, 423, 161 P2d 74 (movement of floodlight tower). But see *Lewis v PG&E* (1949) 95 CA2d 60, 63, 212 P2d 243 (sewer digger's crane touched overhead lines).

The injured person need not prove that the power company should have anticipated an identical accident; establishing the reasonable foreseeability of the likelihood of injury because of the location or condition of the power line is sufficient. *McKenzie v PG&E* (1962) 200 CA2d 731, 738, 19 CR 628, 632, disapproved on other grounds at 58 C2d 299.

On the other hand, a power company need not anticipate every possible circumstance under which someone might come into contact with its wires; its duty is limited to reasonably foreseeable hazards. *Perrine v PG&E* (1960) 186 CA2d 442, 449, 9 CR 45. See Anno, 69 ALR2d 93 (1960) (crane, derrick, or machine touches electric line). See also *Stasualt v PG&E* (1937) 8 C2d 631, 638, 67 P2d 678 (unforeseeable intervening act negated proximate cause).

One in control of electric lines must also protect against natural conditions that may foreseeably affect the lines. *Beresford v PG&E* (1955) 45 C2d 738, 746, 290 P2d 498 (tree falling against lines); *Dunn v PG&E* (1954) 43 C2d 265, 275, 272 P2d 745 (impaired clearance due to landfill); *Irelan-Yuba Gold Quartz Mining Co. v PG&E* (1941) 18 C2d 557, 565, 116 P2d 611 (risk from tree outside right-of-way); *Satterberg v PG&E* (1943) 58 CA2d 296, 301, 136 P2d 43 (third person caused concealed ground wire to be charged). But see *Mancuso v Southern Cal. Edison Co.* (1991) 232 CA3d 88, 283 CR 300 (particularly intense lightning strike not foreseeable; electric company did not lose "Act of God" defense). See Anno, 25 ALR2d 722, 733 (1952) (lightning transmitted on wires).

A utility company may be liable for its failure to act with due care and skill after natural forces have caused a live power line to fall. See *Kirby v Southern Cal. Edison Co.* (2000) 78 CA4th 840, 93 CR2d 223 (after telling mother that company had not been negligent or otherwise responsible, company that obtained, for $2500, release from mother within 2 days after son was killed from contact with line downed by high winds not exonerated from possible further liability for son's death).

Whether the placement of a telephone booth near a busy thoroughfare created a reasonably foreseeable risk that users of the booth might be hit by a car veering off the street was a question of fact for the jury. *Bigbee v Pacific Tel. & Tel. Co.* (1983) 34 C3d 49, 192 CR 857. See Anno, 17 ALR4th 1308 (1982) (liability for injury resulting from condition or location of telephone booth). Similarly, it is a fact question whether placing a concrete street light pole 18 inches from a street was negligence. See *Laabs v Southern Cal. Edison Co.* (2009) 175 CA4th 1260, 97 CR3d 241 (injury to passenger in car that collided with other car and veered into pole).

See Annos listed at the end of §7.1.

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§7.5 4. Nondelegable Duties

As a public utility, a power company has a nondelegable duty to construct and maintain its facilities in a safe condition, and it is subject to liability for negligence of a contractor it hires. *Snyder v Southern Cal. Edison Co.* (1955) 44 C2d 793, 801, 285 P2d 912 (pole installation). Its duties extend to lines under the joint control of itself and its customer. *Irelan-Yuba Gold Quartz Mining Co. v PG&E* (1941) 18 C2d 557, 563, 116 P2d 611.

A power company may also be liable for injuries caused by negligence in installing electrical equipment owned by the customer. *Monroe v San Joaquin Light & Power Corp.* (1941) 42 CA2d 641, 647, 109 P2d 720. Otherwise, at least absent notice of a danger, a power company is not responsible for maintaining customers' private lines. *Benard v Vorlander* (1948) 87 CA2d 436, 440, 197 P2d 42.

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§7.6 C. Strict Product Liability

Electricity or gas, when delivered to a customer's premises, is a "product," and the public utility can be liable for a "defect" in that product. See *Stein v Southern Cal. Edison Co.* (1992) 7 CA4th 565, 8 CR2d 907 (house fire caused by excessive voltage delivered to meter box; too much current is defective product); *Pierce v PG&E* (1985) 166 CA3d 68, 83, 212 CR 283 (policy justifications for strict liability in tort explained).

On the other hand, excess current generated by lightning is not a product. *Mancuso v Southern Cal. Edison Co.* (1991) 232 CA3d 88, 283 CR 300 (such current not subject of market transaction between electric company and consumer and not placed into stream of commerce by company). See *Fong v PG&E* (1988) 199 CA3d 30, 245 CR 436 (electricity does not become product until it passes through customer's meter; negligence principles govern for current in supply lines crossing customer's property); *United Pac. Ins. Co. v Southern Cal. Edison Co.* (1985) 163 CA3d 700, 709, 209 CR 819 (public utility not subject to strict product liability for defects in design or construction of transmission lines; lines not products placed on market; utility company liability for fire caused by placing conductors too close together must be decided under negligence principles).

See Annos, 60 ALR4th 732 (1988) (product liability: electricity), 10 ALR4th 854 (1981) (liability for defective transformer or other equipment), 82 ALR3d 218 (1978) (strict liability for current escaping from power line).

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§7.7 D. Duty Based on Statute, Regulation, or Order

A power company's violation of a statute, regulation, or order relating to the safe construction or maintenance of electric lines or equipment (see, *e.g.,* Pub Util C §§8001-8057; Public Utility Commission General Order 95) gives rise to a presumption of negligence (see §1.31). See *Nevis v PG&E* (1954) 43 C2d 626, 629, 275 P2d 761 (insufficient clearance above road); *Dunn v PG&E* (1954) 43 C2d 265, 275, 272 P2d 745 (insufficient clearance above ground); *Polk v City of Los Angeles* (1945) 26 C2d 519, 541, 159 P2d 931 (worn insulation); *Silveira v Imperial Irrig. Dist.* (1978) 85 CA3d 705, 149 CR 653 (violation of statute requiring certain markings on poles carrying high-voltage lines; workers electrocuted when hayloader boom touched wire); *Howell v San Joaquin Light & Power Corp.* (1927) 87 CA 44, 53, 58, 261 P 1107, 1111 (failure to raise existing line).

Statutes and regulations may also impose duties on the owners of underlying or adjacent structures as well as on power companies. *Bickham v Southern Cal. Edison Co.* (1953) 120 CA2d 815, 820, 263 P2d 32. See *Kingery v Southern Cal. Edison Co.* (1961) 190 CA2d 625, 634, 12 CR 173 (no violation shown). See also Pen C §385 (misdemeanor to operate, place, erect, or move machinery or building within six feet of high-voltage line).

A homeowner who hired a tree-trimming service is not liable for the electrocution death of an employee of the service under allegations of having violated Pen C §385, which makes it a crime to permit an employee to move a saw to within six feet of a power line. See *Ramirez v Nelson* (2008) 44 C4th 908, 80 CR3d 728 (employee was the one who breached duty of care embodied in the statute).

NOTE: Situations in which a presumption of negligence may be based on a breach of California Occupational Safety and Health statutes and regulations are limited. See §6.4.

Showing compliance with safety regulations does not necessarily establish the absence of negligence. *Nevis v PG&E* (1954) 43 C2d 626, 630, 275 P2d 761; *Lozano v PG&E* (1945) 70 CA2d 415, 424, 161 P2d 74. See *United Pac. Ins. Co. v Southern Cal. Edison Co.* (1985) 163 CA3d 700, 712, 209 CR 819 (question of whether evidence of compliance with safety order is evidence of due care or of custom and practice in industry; compliance with order unrelated to claimed negligent design of transmission lines was irrelevant, but not prejudicial).

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§7.8 E. Liability of Owners and Contractors

The owner of the property over or near which utility lines pass, or a contractor in control of such premises or of work being done there, may be liable for injury resulting from failure to protect others by taking such steps as requiring that electric lines be de-energized, posting warnings and safeguards, or taking other precautions. See *Austin v Riverside Portland Cement Co.* (1955) 44 C2d 225, 232, 282 P2d 69, 73 (company controlling premises); *Bickham v Southern Cal. Edison Co.* (1953) 120 CA2d 815, 820, 263 P2d 32, 35 (owner erecting building).

See Annos, 14 ALR4th 913 (1982) (landowner's liability when crane touches power line), 69 ALR2d 160 (1960) (contractor in control of premises or equipment).

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§7.9 F. Persons to Whom Duty Owed

As is discussed more fully in §10.3, the status of a person as a trespasser or licensee no longer precludes the person from recovering damages, although that status may affect the foreseeability of injury. See *Mark v PG&E* (1972) 7 C3d 170, 176, 101 CR 908 (apartment dweller unscrewed bulb in streetlight outside window). Nor does a power company's possession of an easement to run electric lines over property preclude liability to those who contact the lines while using the property. See *Williams v PG&E* (1960) 181 CA2d 691, 700, 5 CR 585, 589 (telephone company employee touched power line); *Lozano v PG&E* (1945) 70 CA2d 415, 420, 161 P2d 74, 77 (landowner's employee). See *McCormick v Great W. Power Co.* (1933) 134 CA 705, 709, 26 P2d 322, 324 (ironworker on building touched wires along public street).

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II. DEFENSES

§7.10 A. Contributory Negligence

The damages of each person whose own lack of care for personal safety contributed to causing her or her injury are proportionally reduced. See *Silveira v Imperial Irrig. Dist.* (1978) 85 CA3d 705, 709, 149 CR 653 (employer and employee electrocuted when hayloader boom touched high-voltage wire; employee's negligence not imputed to employer to reduce latter's recovery). See discussion of contributory fault in §1.41.

The contributory negligence defense presents factual issues when, for example,

- there is no evidence of how or why the injured person came in contact with a charged wire (*Dunn v PG&E* (1954) 43 C2d 265, 278, 272 P2d 745, 752);
- the plaintiff took some precautions to avoid the wires, which appeared to be well insulated (*Polk v City of Los Angeles* (1945) 26 C2d 519, 529, 159 P2d 931, 937);
- the height of the wire in relation to an object being moved was difficult to ascertain (*Lozano v PG&E* (1945) 70 CA2d 415, 426, 161 P2d 74, 80);
- a worker momentarily forgot the presence of the wires (*Austin v Riverside Portland Cement Co.* (1955) 44 C2d 225, 234, 282 P2d 69, 74; *Bickham v Southern Cal. Edison Co.* (1953) 120 CA2d 815, 822, 263 P2d 32, 36);
- the plaintiff had a right to assume that wires were de-energized (*Couch v PG&E* (1947) 80 CA2d 857, 866, 183 P2d 91, 96); or
- the injured person did not know or suspect that the electrical device carried high voltage (*Mark v PG&E* (1972) 7 C3d 170, 181, 101 CR 908 (streetlight)).

There may be cases in which a court can determine, as a matter of law, that the injured person's conduct amounted to contributory fault. See *Rojas v Southern Cal. Edison Co.* (1951) 105 CA2d 258, 259, 233 P2d 141 (person knowingly touched electric wire). On the other hand, contributory negligence may be absent as a matter of law if the plaintiff lacked the expert knowledge necessary to recognize a particular hazard. See *Beresford v PG&E* (1955) 45 C2d 738, 747, 290 P2d 498, 503.

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§7.11 B. Assumption of Risk

At present, the situation would be rare in which a person injured by electricity would be completely barred from recovering damages by the *primary* assumption of risk doctrine. See discussion in §§1.46-1.55. Unreasonably bringing oneself or an object in proximity to, or contact with, a power line, even voluntarily, would be a form of contributory fault that could proportionally reduce, but not preclude, damages. See §7.10.

For discussion of assumption of risk under prior law, see *Martin v PG&E* (1962) 204 CA2d 316, 22 CR 291; *Williams v PG&E* (1960) 181 CA2d 691, 5 CR 585 (defense did not apply when defendant violated safety regulation).

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§7.12 C. Plaintiff's Violation of Statute, Regulation, or Order

It is unlawful for anyone to operate, place, erect, or move any machinery or building within six feet of a high-voltage line. Pen C §385. Violation of this statute gives rise to a presumption of contributory negligence (see §1.42). *Benard v Vorlander* (1948) 87 CA2d 436, 443, 197 P2d 42. Such a violation may be excused, however, by nonnegligent ignorance of an essential fact. *Nevis v PG&E* (1954) 43 C2d 626, 633, 275 P2d 761, 765 (failure to realize presence of wires); *McKenzie v PG&E* (1962) 200 CA2d 731, 739, 19 CR 628, 633, disapproved on other grounds at 58 C2d 299 (failure to realize object was in proximity to wires).

Violation of other regulations does not give rise to the negligence presumption if the regulation was not designed to protect against the occurrence or if the injured person was not within the class for whose protection the regulation was adopted. Evid C §669(a)(3)-(4). See *Mark v PG&E* (1972) 7 C3d 170, 183, 101 CR 908 (ordinance prohibiting damage to lamppost not applicable to unscrewing lightbulb).

There are cases in which reference to certain safety statutes and regulations may not be made. See §7.7.

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§7.13 D. Recreational Use Immunity

An electric utility with an easement over property for its power lines can invoke the recreational use immunity provisions of CC §846 (discussed more fully in §§10.24-10.29) as a defense to a suit by someone injured by contact with the lines while pursuing a recreational purpose. *Prince v PG&E* (2009) 45 C4th 1151, 90 CR3d 732 (child injured using aluminum pole to dislodge kite from lines; immunity defeated property owner's equitable indemnity claim against utility); *Jackson v PG&E* (2001) 94 CA4th 1110, 114 CR2d 831 (child injured using aluminum pole to dislodge kite from lines; liability provisions of Pub Util C §2106 do not abrogate immunity).

To overcome a recreational use immunity defense in suits against utilities involving children who climb transmission towers, plaintiffs must show that the utility willfully or maliciously failed to guard against or warn of the danger of electric shock, and that the company knew that the injury was probable (not merely possible) or failed to install anti-climbing guards or warning signs. See *Manuel v PG&E.* (2009) 173 CA4th 927, 93 CR3d 9 (evidence that some anti-climbing devices were incorrectly installed was not sufficient; presence of such devices rendered immaterial evidence that no warnings had been posted); *Bacon v Southern Cal. Edison Co.* (1997) 53 CA4th 854, 62 CR2d 16 (evidence that electric transmission tower was guarded by "Danger High Voltage Keep Off" sign and barbed wire was sufficient to defeat claim by 13-year-old who climbed tower, received shock, and fell to ground). See discussion in §10.28.

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8

Governmental Liability

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I. INTRODUCTION

§8.1 A. Scope of Chapter

This chapter covers the basic principles of California public entity and public employee liability (see §§8.3-8.10, 8.18-8.25), and the defenses and immunities that may be claimed by such defendants (see §§8.11-8.17, 8.26-8.37, 8.64). It also discusses the procedures claimants must follow in presenting and pursuing claims (see §§8.38-8.54) and actions (see §§8.55-8.66) against public defendants.

California Government Tort Liability Practice (4th ed Cal CEB 1999) (hereafter Govt Tort Liability), Van Alstyne's classic treatise, covers all aspects of government tort liability in detail, including general liability and immunity principles, dangerous conditions of public property, liability and immunities in specific functional areas, liability under the federal Civil Rights Act, and claims and actions against public entities and employees. References to this more comprehensive work are found in most of the following sections. See also Handling Claims Against Government Entities (Cal CEB Action Guide Winter 2000), which provides step-by-step guidelines for an attorney considering an action against a public entity or employee.

This chapter does not cover suits under the federal Civil Rights Act (42 USC §1983; see Govt Tort Liability, chap 13), or the liability of the United States, other nations, states other than California, and other non-California public entities. Briefly, a public entity is not liable under 42 USC §1983 if it did nothing more than employ the tortfeasor (*i.e.,* on the basis of respondeat superior), but it can be liable to a person deprived of a constitutional right if the entity had a policy that amounted to "deliberate indifference" to that right and the policy was the "moving force" behind the violation of that right. *Anderson v Warner* (9th Cir 2006) 451 F3d 1063, 1070 (alleged road rage assault by off-duty employee of county sheriff's department after vehicle collision).

Also excluded from coverage are principles governing suits alleging inverse condemnation. On such suits, see Govt Tort Liability §§9.60A-9.74. See also, *e.g., Arreola v County of Monterey* (2002) 99 CA4th 722, 122 CR2d 38 (noted in §8.30 on design immunity; state, county, and district liability for floodwater damage after levee failure).

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§8.2 B. General Principles

All government tort liability must be based on statute. *Hoff v Vacaville Unified Sch. Dist.* (1998) 19 C4th 925, 932, 80 CR2d 811 (public entity not liable for injury arising from a public employee's act or omission except as provided by statute). The California Tort Claims Act (Govt C §§810-996.9) provides the basis for the liability of the state and other California public entities (defined in §811.2) for injury (defined in §810.8 to include death, personal injury, and property damage). Contractual liabilities, the right to obtain relief other than for money or damages (*e.g.,* for an injunction), and rights under the Workers' Compensation Act are not affected by the Tort Claims Act.

NOTE: The Tort Claims Act governs government tort liability "[e]xcept as otherwise provided by statute." Govt C §815. It is the primary, but not the exclusive, basis for government tort liability. "The statute providing for liability need not be part of the Tort Claims Act itself." *Rodriguez v Inglewood Unified Sch. Dist.* (1986) 186 CA3d 707, 716, 230 CR 823, 828.

Under the Tort Claims Act, a public employee is liable for his or her torts to the same extent as a private person. Govt C §820(a). For the few exceptions, see Govt Tort Liability §§9.18-9.20.

A public entity's liability for a public employee's conduct is usually based on respondeat superior principles: That is, a public entity is responsible, within statutory limits, for its employees' actionable torts committed in the scope of the employment. Govt C §815.2(a). See §8.9 on an entity's liability for failing to perform a mandatory duty. See §§8.3-8.10, 8.18-8.25 for discussion of public entity and public employee liability.

Defenses are available to public entities and employees to the same extent they are available to private persons unless a statute provides otherwise. Govt C §815(b). The Tort Claims Act also provides immunities for public entities and employees that may negate liability provisions. Govt C §815(b). See *Universal By-Products, Inc. v City of Modesto* (1974) 43 CA3d 145, 117 CR 525. Generally, an entity is not liable if its employee is immune. Govt C §815.2(b). See §§8.11-8.17, 8.26-8.37, 8.64 for discussion of defenses and immunities available to public entities and employees.

A written claim for death, personal injury, or damage to personal property or growing crops must normally be presented to a public entity within 6 months after accrual of the cause of action. Govt C §911.2. See §§8.38-8.54 for discussion of the procedures for making claims against public entities and employees. No suit for money or damages may be brought against a public entity unless, subject to estoppel and late claim relief, a claim has been presented in compliance with Govt C §§900-915.2 and rejected by the entity. Govt C §945.4. See §§8.55-8.66 for discussion of the procedures for filing legal actions against public entities and employees.

See Govt Tort Liability §§9.1-9.59.

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II. LIABILITY FOR PUBLIC EMPLOYEES' CONDUCT

A. Respondeat Superior

§8.3 1. Ascertaining Employee Status

In analyzing vicarious liability under the respondeat superior principle, whether the person who has acted or failed to act is actually an employee of the entity is an important factor. Govt C §815.2(a). Government Code §810.2 defines who is to be considered an employee for purposes of determining government tort liability. It includes an officer, a judicial officer as defined in Elec C §327, and an employee or servant, whether or not compensated, but it does not include an independent contractor. See *Townsend v State* (1987) 191 CA3d 1530, 237 CR 146 (student-athlete held not to be employee of school for purposes of government tort liability, regardless of whether the student is on scholarship). See also *Munoz v City of Palmdale* (1999) 75 CA4th 367, 89 CR2d 229 (unpaid volunteer at city's "senior center" deemed not to be employee for respondeat superior purposes, court applying Labor Code definitions of "employee"). See Anno, 85 ALR5th 301 (2001) (school liability for accident involving motor vehicle operated by student).

A public entity being sued by one of its own employees for injury caused by the tortious acts of another of its employees may assert the workers' compensation exclusivity immunity defense. See *Fretland v County of Humboldt* (1999) 69 CA4th 1478, 82 CR2d 359 (entity immune from vicarious, respondeat superior liability for coemployee's assault, not aided, encouraged or condoned by the employer, but not for alleged discrimination based on plaintiff's physical disability). See California Workers' Damages Practice (2d ed Cal CEB 2001).

See Govt Tort Liability §9.7.

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§8.4 2. Determining Whether Employee Acting in Scope of Employment

To establish a public entity's liability for its employee's acts, an employee must have been acting within the "scope of employment." Govt C §815.2(a). General principles of employment and vicarious liability apply. See *Sanborn v Chronicle Publishing Co.* (1976) 18 C3d 406, 411, 134 CR 402. See generally §§4.45-4.62. A public employee is considered to be acting within the course and scope of his employment "when he is engaged in work he was employed to perform or when the act is an incident to his duty and was performed for the benefit of his employer and not to serve his own purposes or conveniences." *Neal v Gatlin* (1973) 35 CA3d 871, 875, 111 CR 117, 120. Conversely, purely private acts of an off-duty employee are not ordinarily within the scope of employment, even when the employee is a police officer or firefighter. See *K.G. v County of Riverside* (2003) 106 CA4th 1374, 131 CR2d 762 (county not liable to girl molested by stepfather who was deputy sheriff; fact that he controlled and intimidated her by threatening to use his authority as officer insufficient to bring his conduct within scope of his employment); *Mendoza v City of Los Angeles* (1998) 66 CA4th 1333, 1339, 78 CR2d 525 (no evidence supported city liability for negligent hiring of police officer who shot fiancée with personal gun); *Thorn v City of Glendale* (1994) 28 CA4th 1379, 1383, 35 CR2d 1 (fire marshal conducting inspection set off incendiary devices which destroyed the premises); *Van Ort v Estate of Stanewich* (9th Cir 1996) 92 F3d 831, 836 (civil rights action cannot be based on criminal conduct of off-duty police officer; negligent training and supervision claim also rejected). See also *Hoblitzell v City of Ione* (2003) 110 CA4th 675, 2 CR3d 8 (city building inspector and law enforcement officer not acting within scope of employment when harassing contractor outside of city's territory and jurisdiction); *Tognazzini v San Luis Coastal Unified Sch. Dist.* (2001) 86 CA4th 1053, 103 CR2d 790 (classroom tutor driving away from site of mandatory fingerprinting on day off not acting in scope of employment); *Myricks v Lynwood Unified Sch. Dist.* (1999) 74 CA4th 231, 241, 87 CR2d 734 (part-time parks department employee was not within scope of employment while driving van carrying members of summer league basketball team on out-of-state trip). But see *Senger v U.S.* (9th Cir 1996) 103 F3d 1437 (liability for negligent hiring and supervision of postal employee when entity had actual or constructive knowledge of employee's violent past conduct).

The public entity may be liable for the tortious conduct of one of its employees who was acting in the scope of the employment even if the plaintiff cannot identify the particular employee. See *Perez v City of Huntington Beach* (1992) 7 CA4th 817, 820, 9 CR2d 258, 260 (plaintiff proved he was wrongfully hit by police officers).

On whether a law enforcement officer's acts were within scope of employment, and on entity liability for negligent hiring, see §8.13.

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§8.5 3. Liability Based on Negligence: Breach of Duty of Care

To establish liability based on an employee's negligence, there must have been a breach of a duty of care owed by a public employee to the plaintiff. *Hoff v Vacaville Unified Sch. Dist.* (1998) 19 C4th 925, 938, 80 CR2d 811 (school personnel owed neither common law nor Ed C §44807 duty to pedestrian hit by car of student peeling out of school parking lot); *Randi W. v Muroc Joint Unified Sch. Dist.* (1997) 14 C4th 1066, 1076, 60 CR2d 263 (employer's duty to use reasonable care in recommending former employees without disclosing material information bearing on their fitness).

In determining whether a public agency employee owes that duty to someone, courts will consider not only the usual factors but also the extent of the entity's powers, the role imposed on it by law, and the limitations of its budget. *Thompson v County of Alameda* (1980) 27 C3d 741, 750, 167 CR 70, 75 (extent of duty to warn on release of dangerous offender). See *de Villiars v County of San Diego* (2007) 156 CA4th 238, 248, 67 CR3d 253 (county and co-employees had no duty to prevent toxicologist from stealing drugs and using them to murder her husband; no liability based on negligent hiring or supervision).

Courts have rejected attempts to impose a restricted standard of care on public employees. See *Lugtu v California Highway Patrol* (2001) 26 C4th 703, 718, 110 CR2d 528 (see §4.65); *M.W. v Panama Buena Vista Union Sch. Dist.* (2003) 110 CA4th 508, 518, 1 CR3d 673 (see §1.29). See Govt Tort Liability §§9.8-9.10.

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§8.6 4. Vicarious Liability for Negligent and Intentional Acts

The vicarious liability of a public entity is not limited to negligent acts or omissions, but includes intentional torts. See *Ramos v County of Madera* (1971) 4 C3d 685, 94 CR 421 (coercion and willful harassment).

A public entity can be liable for an intentional tort committed by its employee if

- the tort was committed within the scope of employment, *i.e.,* as an integral part of a course of action on the employer's behalf; or
- the tortious conduct was "foreseeable," *i.e.,* the conduct was not so unusual or startling that it seems unfair to include the loss among other costs of the employer's business, or was typical of, broadly incidental to, or characteristic of the employer's business.

See *Alma W. v Oakland Unified Sch. Dist.* (1981) 123 CA3d 133, 139, 176 CR 287, 289 (district not liable for custodian's sexual assault on pupil even though it occurred on school day in custodian's office at school). See Anno, 17 ALR4th 881 (1982) (entity liability for assault by employee other than police officer).

A public entity may defeat a wrongful termination lawsuit by invoking Govt C §821.6. *Ross v San Francisco Bay Area Rapid Transit Dist.* (2007) 146 CA4th 1507, 53 CR3d 715 (alleged age and disability discrimination).

A school district can be vicariously liable for the emotional distress suffered by parents who learned that their daughter had been having a sexual relationship with a teacher on proof that the district (1) knew of the teacher's wrongful conduct and failed to take appropriate action, (2) was negligent in hiring or retaining the teacher, or (3) knew of a prior pedophiliac or other tendency on the teacher's part to have sex with his students. *Steven F. v Anaheim Union High Sch. Dist.* (2003) 112 CA4th 904, 6 CR3d 105 (other teachers knowing of relationship but not reporting it was not sufficiently outrageous to support emotional distress damages). Other cases discussing bases for district liability to a student or the student's parents, as well the district's estoppel to invoke a statute of limitations defense (see §8.51), include *K.J. v Arcadia Unified Sch. Dist.* (2009) 172 CA4th 1229, 92 CR3d 1 (see §8.39); *John R. v Oakland Unified Sch. Dist.* (1989) 48 C3d 438, 445, 256 CR 766; *Ortega v Pajaro Valley Unified Sch. Dist.* (1998) 64 CA4th 1023, 75 CR2d 777; *Christopher P. v Mojave Unified Sch. Dist.* (1993) 19 CA4th 165, 23 CR2d 353.

See Govt Tort Liability §9.7.

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§8.7 5. Effect of Immunities

The vicarious responsibility principle of respondeat superior for public entities is qualified by three important factors:

- Public employees are immune from personal liability in a substantial number of situations that inure to the benefit of their employers. See Govt Tort Liability §9.18.
- Public entities have a limited number of express statutory immunities even when employees are personally liable. See Govt Tort Liability §9.19.
- In some instances, public entities may be liable even though no public employee is personally liable. See Govt Tort Liability §9.20.

A statutory immunity provision may control over a liability statute. See *Richardson-Tunnell v School Ins. Program for Employees (Sipe)* (2007) 157 CA4th 1056, 1063, 69 CR3d 176 (scope of Govt C §821.6 governmental investigatory immunity precluded liability under CC §1708.8 (anti-paparazzi law) or for invasion of privacy); *Eastburn v Regional Fire Protection Dist.* (2003) 31 C4th 1175, 7 CR3d 552 (immunity extended to public employees performing emergency rescue services by Health & S C §1799.107 prevailed over general tort provisions in CC §1714 to immunize 911 dispatchers absent gross negligence or bad faith). For cases discussing immunities provided by the Education Code, see §1.29.

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§8.8 B. Need to Provide Defense, Pay Damages

The Tort Claims Act requires a public entity to provide a defense for, and pay any judgment, compromise, or settlement based on, a claim against any of its employees or former employees for an injury arising from an act or omission occurring within the scope of employment. Govt C §§825(a), 995-996.6. The employee or former employee must request the public entity to defend him or her. Govt C §825(a). The employee must, moreover, establish that the acts for which the defense or indemnity is sought were within the scope of the public employment. *Farmers Ins. Group v County of Santa Clara* (1995) 11 C4th 992, 47 CR2d 478 ("scope of employment" broadly interpreted; county, liable to plaintiff on other grounds, did not need to defend or reimburse employee who sexually harassed other employees). See *Stone v Regents of Univ. of Cal.* (1999) 77 CA4th 736, 92 CR2d 94 (no initial obligation to provide defense for doctors at entity-affiliated fertility clinic accused of "egg stealing"); *State Farm Fire & Cas. Co. v Century Indem. Co.* (1997) 59 CA4th 648, 69 CR2d 403 (school district's insurer had no duty to defend teacher accused of molesting students).

The entity is not required to provide or pay for counsel to defend public employees that is different from counsel defending the entity. *City of Huntington Beach v Petersen Law Firm* (2002) 95 CA4th 562, 115 CR2d 568. The employee must file a timely claim with the public entity from which reimbursement for attorney fees and costs is sought. *Sparks v Kern County Bd. Of Supervisors* (2009) 173 CA4th 794, 93 CR3d 173.

See §8.62 on grounds for refusing to pay damages and §8.63 on an entity's obligation to pay punitive damages assessed against an employee.

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Source: Torts/California Tort Guide/8 Governmental Liability/§8.9 C. Liability for Failure to Perform Mandatory Duty

§8.9 C. Liability for Failure to Perform Mandatory Duty

A public entity is liable for injury caused by its failure to discharge a mandatory duty imposed on it by an enactment that is designed to protect against the risk of that kind of injury. Govt C §815.6. See Govt C §§818.2, 818.4 (immunities inapplicable); *Morris v County of Marin* (1977) 18 C3d 901, 136 CR 251 (county's failure to enforce Lab C §3800 requirement that building permittee be insured for workers' compensation); *Sullivan v County of Los Angeles* (1974) 12 C3d 710, 117 CR 241 (failure to release prisoner as required by Pen C §1384); *N.V. Heathorn, Inc. v County of San Mateo* (2005) 126 CA4th 1526, 25 CR3d 400 (county's failure to require payment bond of general contractor, as required by CC §3096); *Alejo v City of Alhambra* (1999) 75 CA4th 1180, 89 CR2d 768 (police had duty under Pen C §11166 (Child Abuse and Neglect Reporting Act) to investigate reported abuse of child and failure to act created liability when child suffered further abuse); *Davila v County of Los Angeles* (1996) 50 CA4th 137, 57 CR2d 651 (coroner's failure to notify next of kin before cremating body). But see *California Highway Patrol v Superior Court (Walker)* (2008) 162 CA4th 1144, 76 CR3d 578 (statute permitting CHP to impound drunk drivers' vehicles did not impose mandatory duty to do so); *Ortega v Sacramento County Dep't of Health & Human Servs.* (2008) 161 CA4th 713, 74 CR3d 390 (conducting investigation of father before releasing child to him complied with statutory duties; defendants immune from liability when he later stabbed her); *Sonoma Ag Art, LLC v Department of Food & Agric.* (2004) 125 CA4th 122, 22 CR3d 468 (negligent finding that plaintiff's grape vines were diseased not failure to perform mandatory duty; Govt C §818.4 immunity applied).

Section 815.6 sets a three-pronged test: (1) an enactment must impose a mandatory, not discretionary, duty; (2) the enactment must intend to protect against the risk of the kind of injury that the plaintiff suffered; and (3) breach of the mandatory duty was a legal cause of the injury. *Sutherland v City of Fort Bragg* (2000) 86 CA4th 13, 19, 102 CR2d 736. Thus, there is no liability under Govt C §815.6 if the duty imposed was not mandatory or if the plaintiff's loss was not of the kind the enactment was intended to prevent. See *Haggis v City of Los Angeles* (2000) 22 C4th 490, 93 CR2d 327 (city ordinance requirement that city record certificate on finding that property has become unstable imposed mandatory duty, but not one intended to protect potential future purchasers); *Creason v Department of Health Servs.* (1998) 18 C4th 623, 76 CR2d 489 (state not liable for department's failure to diagnose and report infant's hereditary disorder; Hereditary Disorders Act (Health & S C §§124975-124995) does not impose mandatory duty to select or impose particular test; department immune from liability under Govt C §855.6); *Tilton v Reclamation Dist. No. 800* (2006) 142 CA4th 848, 48 CR3d 366 (no state or federal statute imposed mandatory duty on district to build or maintain leakproof levees); *County of Los Angeles v Superior Court* (2002) 102 CA4th 627, 125 CR2d 637 (allegations that county placed child in foster home where he was molested showed no "enactment" that county breached); *Wilson v County of San Diego* (2001) 91 CA4th 974, 111 CR2d 173 (no statutory mandatory duty to prevent minor from running away from protective custody); *Trinkle v California State Lottery* (1999) 71 CA4th 1198, 84 CR2d 496 (prohibition against false advertising was intended to protect public that played lottery games, not vendor of rival games); *Becerra v County of Santa Cruz* (1998) 68 CA4th 1450, 1462, 81 CR2d 165 (county not liable for death of child placed in foster home); *Waschek v State* (1997) 59 CA4th 640, 69 CR2d 296 (state not liable for renewal of driver's license after DMV examiner determined that 96-year-old with cataracts could drive safely during daytime).

NOTE: A school district may be liable for failing to disclose to a future employer a district employee's sexual wrongdoing. *Randi W. v Muroc Joint Unified Sch. Dist.* (1997) 14 C4th 1066, 60 CR2d 263. See Child Abuse and Neglect Reporting Act (Pen C §§11164-11174.3).

This form of entity liability is distinct from liability under Govt C §815.2 for an employee's wrongful acts or omissions, and the entity is not protected by any immunity possessed by the employee who failed to perform the duty. *Bradford v State* (1973) 36 CA3d 16, 111 CR 852 (court clerk's failure to enter dismissal of conviction led to plaintiff's later arrest and humiliation). But see *Forbes v County of San Bernardino* (2002) 101 CA4th 48, 57, 123 CR2d 721 (allegations that defendants intentionally or negligently destroyed court records, thereby making appeal impossible and requiring expense of new trial, failed to state the kind of "injury," as defined in Govt C §810.8, cognizable under §815.6; further, statutes imposed duty to retain records on trial court clerks and possibly reporters, not on state).

On the "discretionary function" exception to liability under the Federal Tort Claims Act (28 USC §§1346(b), 2671-2680), see *Terbush v U.S.* (9th Cir 2008) 516 F3d 1125 (alleged failure to maintain rock-climbing area); *Whisnant v U.S.* (9th Cir 2005) 400 F3d 1177 (alleged failure to control accumulation of toxic mold in navy commissary's meat department not protected under discretionary function exception); *O'Toole v U.S.* (9th Cir 2002) 295 F3d 1029 (government agency's decision not to spend money to repair irrigation system on government-owned property did not give rise to discretionary function immunity against downstream property damage).

See Govt Tort Liability §§9.25-9.44.

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§8.10 D. Liability for Acts of Independent Contractors or Joint Venturers

A public entity is liable for its independent contractors' torts "to the same extent that the public entity would be subject to such liability if it were a private person," except that there is no liability "if the public entity would not have been liable for the injury had the act or omission been that of an employee of the public entity." Govt C §815.4. See *McCarty v Department of Transp.* (2008) 164 CA4th 955, 973, 79 CR3d 777 (hirer can be liable to independent contractor's employee under "retained control" doctrine if Govt C §815.4 requirements met). On "retained control" liability, see California Workers' Damages Practice §9.10 (2d ed Cal CEB 2001).

The entity may be liable under exceptions to the independent contractor rule, including those based on nondelegable duties. *Van Arsdale v Hollinger* (1968) 68 C2d 245, 256, 66 CR 20, 26, disapproved on other grounds at 5 C4th 702 n4 (contractor hired for street work); *O'Gan v King City Joint Union High Sch. Dist.* (1970) 3 CA3d 641, 646, 83 CR 795, 797 (negligent installation of fixtures in school). A public entity has the same nondelegable duty as a private person to require and provide special precautions for dangerous work undertaken by its contractors. *Fonseca v County of Orange* (1972) 28 CA3d 361, 104 CR 566.

A public entity that enters into a joint venture with a private entity can be vicariously liable for injury resulting from the negligence of the private entity's employee. See *Dixon v City of Livermore* (2005) 127 CA4th 32, 25 CR3d 50 (city exonerated for plaintiff's failure to establish joint venturer's legal fault).

See Govt Tort Liability §§9.21-9.24.

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E. General Immunities

§8.11 1. Discretionary Acts and Omissions of Public Employees

A public employee is not ordinarily liable for an injury resulting from an exercise of discretion vested in the employee. Govt C §820.2. The employing entity is entitled to the same immunity. Govt C §815.2(b). Section 820.2 provides immunity only for "basic policy decisions," not for acts that are "ministerial," operational, or administrative. *Perez-Torres v State* (2007) 42 C4th 136, 145, 64 CR3d 155 (parole agents' keeping "wrong man" in jail as parole violator after they should have known he was not parolee was ministerial act not protected by Govt C §§820.2, 845.8); *Barner v Leeds* (2000) 24 C4th 676, 685, 102 CR2d 97 (deputy public defender not immunized from legal malpractice liability for failing to ask for informant's identity); *Ma v City & County of San Francisco* (2002) 95 CA4th 488, 492, 115 CR2d 544, disapproved on other grounds at 31 C4th 1184 (city immune from liability for design of its 911 system); *Bohrer v County of San Diego* (1980) 104 CA3d 155, 161, 163 CR 419, 423 (act of increasing patient's drug dosage after notice that patient was abusing drugs was ministerial); *Bonds v State ex rel Cal. Highway Patrol* (1982) 138 CA3d 314, 322, 187 CR 792 (§820.2 is constitutional). See *Ogborn v City of Lancaster* (2002) 101 CA4th 448, 460, 124 CR2d 238 (director of nuisance abatement program immune, but not enforcement officer who forced plaintiffs out of rented house and ordered it to be destroyed by bulldozer).

Discretionary immunity is restricted to basic policy decisions reached at an executive level, as contrasted with ministerial implementation of that policy at lower levels of official responsibility. *Caldwell v Montoya* (1995) 10 C4th 972, 42 CR2d 842 (school board members protected under immunity provision of Govt C §820.2 from charges of race and age discrimination; school board members' determination to replace superintendent was basic governmental policy decision); *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425, 444, 131 CR 14 (entity and employee therapists not immune from liability for failure to warn patient's prospective victim). Section 820.2 provides no immunity for acts outside the public employee's authority. *Jamgotchian v Slender* (2009) 170 CA4th 1384, 145, 89 CR3d 122 (racing steward had no authority to require horse to be raced).

California courts have rejected a mechanical approach to distinguishing discretionary acts (for which public entities and employees are immune) from ministerial acts (for which they may be liable). They adopt a functional approach that focuses on the underlying reason for granting immunity: to ensure judicial abstention in areas in which the responsibility for basic policy decisions has been given to the entity or employee. See *Nunn v State* (1984) 35 C3d 616, 622, 200 CR 440 (difference is between "planning" and "operational" levels of decision making; immunity provided by Govt C §§818.2 and 821 (see §8.20) attaches only to discretionary functions). See also *Soto v State* (1997) 56 CA4th 196, 200, 65 CR2d 11 (immunity for performing, or failing to perform, a discretionary function or duty in carrying out the California Emergency Services Act (Govt C §§8550-8551)). But see *Thousand Trails, Inc. v California Reclamation Dist. No. 17* (2004) 124 CA4th 450, 21 CR3d 196 (Govt C §8655 provided immunity for district that cut levee in attempt to divert flood waters); *Leyva v Nielson* (2000) 83 CA4th 1061, 100 CR2d 231 (discretionary function immunity coupled with parole decision immunity in Govt C §845.8 held to immunize prison term board chair and commissioners from liability for failing to parole, allegedly in breach of plea agreement).

NOTE: A finding that acts of employees of an Indian tribe were "discretionary in nature" may be needed for those employees to claim the tribe's sovereign immunity against liability for allegedly assaulting and improperly detaining union organizers at the tribe's casino. See *Turner v Martire* (2000) 82 CA4th 1042, 99 CR2d 587.

A governmental employee's acts that are "policy-making" may still be actionable if they violate a constitutional or other legal mandate. See *Nurse v U.S.* (9th Cir 2000) 226 F3d 996 (passenger searched at airport alleged that policy-making defendants promulgated discriminatory policies).

In suits under the Federal Tort Claims Act (28 USC §§1346(b), 2671-2680), courts determine whether the discretionary function immunity in 28 USC §2680(a) applies by asking first whether the challenged conduct involved an element of judgment or choice, then whether the judgment or choice made was "grounded in social, economic, or political policy." *Soldano v U.S.* (9th Cir 2006) 453 F3d 1140, 1147 (liability for motorcycle crash could be based on

evidence that park service negligently set speed limit relative to road's design). See also *Alfrey v U.S.* (9th Cir 2002) 276 F3d 557 (liability for negligent failure to discharge nondiscretionary function). But see *Cleveland v U.S.* (ND Cal 2008) 546 F Supp 2d 732, 751 (discretionary function immunity absolved government from liability for failing to erect fencing or post warning signs at open mine shaft in national recreation area used by off-road vehicle drivers).

See Govt Tort Liability §§10.6-10.32.

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Source: Torts/California Tort Guide/8 Governmental Liability/§8.12 2. Other General Immunities

§8.12 2. Other General Immunities

A variety of other immunities are authorized by Govt C §§818.4 (public entity immunity) and 821.2 (public employee immunity) and other sections, including immunity for the following:

- Licensing activities (Govt C §818.4; see Govt Tort Liability §§10.63-10.67);
- Health and safety inspections (Govt C §818.6; see Govt Tort Liability §§10.48-10.49);
- Legislating or failing to legislate (Govt C §§818.2, 821; see Govt Tort Liability §§10.50-10.52);
- Enforcement or nonenforcement of law (Govt C §820.4; see Govt Tort Liability §§10.53-10.58);
- False arrest and false imprisonment (see Govt Tort Liability §10.45);
- Malicious prosecution (Govt C §821.6; see Govt Tort Liability §§10.43-10.44);
- Acts in good faith, without malice, under unconstitutional, invalid, or inapplicable enactment (Govt C §820.6; see Govt Tort Liability §§10.59-10.60);
- Authorized entry on private property (Govt C §821.8; see Govt Tort Liability §§10.61-10.62);
- Misrepresentation (Govt C §818.8; see Govt Tort Liability §§10.38-10.42);
- Public officers for acts and omissions of others or of the entity or advisory body (Govt C §§820.8-820.9; see Govt Tort Liability §§10.33-10.35); and
- Money stolen from official custody (Govt C §822; see Govt Tort Liability §10.37).

Neither Govt C §821.6 nor Govt C §820.4 provides immunity from liability for violation of the state civil rights law, CC §52.1, although they may for defamation and intentional infliction of emotional distress. *Gillan v City of San Marino* (2007) 147 CA4th 1033, 1050, 55 CR3d 158. Provisions immunizing public entities and employees from liability for particular acts may be found in a variety of other statutes. See, *e.g., Ley v State* (2004) 114 CA4th 1297, 8 CR3d 642 (CC §1618 provided complete immunity from liability for injury caused by person placed in community outpatient program for mentally disordered offenders).

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F. Liabilities and Immunities in Specific Functional Areas

1. Police and Correctional Activities

§8.13 a. Liabilities

A public entity and individual law enforcement officers can be liable for injuries caused by the tortious conduct of those officers. See, *e.g., Munoz v Olin* (1979) 24 C3d 629, 156 CR 727 (arson investigators negligent in shooting and killing suspect); *Grassilli v Barr* (2006) 142 CA4th 1260, 48 CR3d 715 (CHP officers liable for retaliating against citizen who reported officer's misconduct); *Munoz v City of Union City* (2004) 120 CA4th 1077, 16 CR3d 521 (city vicariously liable for officer's breach of duty of care not to use deadly force in unreasonable manner; officer shot woman armed with knives; see §8.66 on liability allocations in this case); *Jenkins v County of Los Angeles* (1999) 74 CA4th 524, 88 CR2d 149 (damages recovery for person shot by police officers not barred by CC §3333.3, which does not apply to intentional tort; triable issue of fact whether injuries were sustained during flight from felony; see §4.81 for more on Proposition 213). The vicarious liability imposed on a public entity for its employees' wrongful acts does not extend to such employees' superiors absent evidence of their participation in such acts. *Wathan v Merced County Sheriff* (ED Cal 2007) 2007 US Dist Lexis 41850, *13.

The entity is liable for an officer's use of deadly force to effect an arrest, however, only if the plaintiff proves that the officer used unreasonable force. *Yount v City of Sacramento* (2008) 43 C4th 885, 76 CR3d 787 (officer shot resisting arrestee with pistol, mistakenly believing that he had pulled out his taser); *Edson v City of Anaheim* (1998) 63 CA4th 1269, 1272, 74 CR2d 614 (officer shot fleeing suspect who he thought was reaching for gun; see Pen C §835a). An entity is not liable for a shooting death if the officers' actions were "objectively reasonable." *City of Simi Valley v Superior Court (Bayer)* (2003) 111 CA4th 1077, 1086, 4 CR3d 468 (suspect with gun threatened to shoot self and officers, apparently attempting "suicide by cop"). Further, an entity is not liable for a shooting by off-duty officers working as private security guards when conditions specified in Pen C §70 have not been met. *Melendez v City of Los Angeles* (1998) 63 CA4th 1, 73 CR2d 469 (no liability under theories of respondeat superior, failure adequately to supervise, or violation of victim's civil rights). See also *Ritschel v City of Fountain Valley* (2006) 137 CA4th 107, 40 CR3d 48 (plaintiff arrested for drunk driving failed to show that officers' conduct in obtaining blood sample violated either federal or state law rights).

When shooting a fleeing suspect is a reasonable use of force, negligent conduct by police prior to the shooting does not provide a basis for police or entity liability. *Hernandez v City of Pomona* (2009) 46 C4th 501, 94 CR3d 1 (federal court jury had decided that force used was reasonable; see §4.82 on police pursuit). See *Brown v Ransweiler* (2009) 171 CA4th 516, 89 CR3d 801 (objectively reasonable shooting of suspect immunized officer and entity from tort liability to bystanders injured by stray bullet fragments).

When a police officer on duty causes injury through misuse of official authority, the public entity that employs the officer can be held vicariously liable for his or her misconduct. *Mary M. v City of Los Angeles* (1991) 54 C3d 202, 218, 285 CR 99 (officer stopped motorist for erratic driving, gave her field sobriety test, then drove her to her house where he raped her). See *Doe 1 v City of Murrieta* (2002) 102 CA4th 899, 907, 126 CR2d 213 (city not liable for harm to teenage girls who had consensual sex with officer during city-sponsored "ride-along" program); *Barsamian v City of Kingsburg* (ED Cal 2009) 597 F Supp 2d 1054 (city liable for officer obtaining oral sex from citizen in her house).

NOTE: The present viability of the supreme court's analysis in *Mary M. v City of Los Angeles* has been questioned in *M.P. v City of Sacramento* (2009) 177 CA4th 121, 98 CR3d 812 (firefighters who allegedly sexually assaulted woman invited onto fire truck during "Porn Star Costume Ball" were outside scope of employment; city not vicariously liable).

Generally, there is no duty and hence no negligence, unless a special relationship exists between the police and either the victim or the third party that gives rise to a responsibility to control the third person's conduct. See *Zelig v County of Los Angeles* (2002) 27 C4th 1112, 119 CR2d 709 (county had no special relationship with litigants in family

law matter sufficient to justify liability for not preventing one from shooting another in courthouse); *Davidson v City of Westminster* (1982) 32 C3d 197, 203, 185 CR 252 (during surveillance, officers failed to warn woman in laundromat after seeing suspect in prior stabbings repeatedly enter and leave laundromat); *Benavidez v San Jose Police Dep't* (1999) 71 CA4th 853, 866, 84 CR2d 157 (fact that police had responded to earlier attack on plaintiff by boyfriend did not create special relationship to her that would make officers liable for her injury from attack after they left); *Adams v City of Fremont* (1998) 68 CA4th 243, 264, 80 CR2d 196 (police officers' failure to prevent suicide by person who had loaded gun breached no duty to heirs or others; see §1.7); *Hernandez v City of Pomona* (1996) 49 CA4th 1492, 57 CR2d 406 (officers not liable for murder of young gang member who was pressured into making a statement implicating fellow members who were involved in prior killing); *Denton v City of Fullerton* (1991) 233 CA3d 1636, 285 CR 297 (police have no general duty to warn citizens of potentially dangerous persons even if informed by another person or entity that such an individual presents danger). But see *Zuniga v Housing Auth.* (1995) 41 CA4th 82, 99, 48 CR2d 353 (Govt C §845 may not extend to claims that entity failed to protect public housing residents from criminal conduct by means other than police action); *Wallace v City of Los Angeles* (1993) 12 CA4th 1385, 16 CR2d 113, disapproved on other grounds at 50 CA4th 1809 n7 (city and police officer had duty to warn person of peril created by asking her to assist and be a witness in a homicide investigation; they had a special relationship with her; Govt C §§820.2, 845 immunities inapplicable); *Carpenter v City of Los Angeles* (1991) 230 CA3d 923, 281 CR 500 (duty to warn witness after serious threat reported to detective).

The "special relationship" that exists between a jailer and a prisoner gives rise to a duty of care to protect the prisoner from foreseeable harm inflicted by a third party, but the prisoner has no right of action for damages for alleged violation of constitutional prohibitions against cruel and unusual punishment. *Giraldo v California Dep't of Corrections & Rehabilitation* (2008) 168 CA4th 231, 85 CR3d 371 (male-to-female transgender inmate housed with male inmates beaten and raped by one of them).

Police and parole officers have no affirmative duty to warn local police, the public generally, or even persons in the neighborhood of the release of an offender who has a history of violence unless that person has specifically threatened harm toward a specific individual or group. *Thompson v County of Alameda* (1980) 27 C3d 741, 754, 167 CR 70, 77. Even when a public entity assumes a duty to warn of an offender's danger to a specific person, the duty is not necessarily of an indefinite duration. *Weissich v County of Marin* (1990) 224 CA3d 1069, 274 CR 342 (defendants had no duty to warn former district attorney of convict's continuing criminal conduct 8 years after his release from prison, even though convict had earlier vowed revenge on district attorney and defendants had earlier agreed to provide warning of continuing threat of violence).

Public prosecutors have quasi-judicial immunity from liability for failure to warn or protect witnesses. *Falls v Superior Court* (1996) 42 CA4th 1031, 1044, 49 CR2d 908 (deputy district attorneys were immune from liability for murder of witness to drive-by homicide). On prosecutorial immunity generally, see *Bradley v Medical Bd.* (1997) 56 CA4th 445, 454, 65 CR2d 483 (absolute immunity of deputy attorney general in civil rights action). A district attorney acts on behalf of the state, not the county in which he or she holds office, at least when training personnel for and developing policy about the preparation for prosecution and the prosecution of criminal violations of state law. *Pitts v County of Kern* (1998) 17 C4th 340, 70 CR2d 823.

See Govt Tort Liability §11.21. See generally Comment, *Police Officers' Duty to Rescue or Aid: Are They Only Good Samaritans?*, 72 Cal L Rev 661 (1984); Annos, 90 ALR5th 273 (2001) (liability for failing to provide police protection from crime), 6 ALR4th 1155 (1981) (liability for injuries caused by person negligently released).

On the liability of law enforcement officers and public entities for injuries resulting from the vehicular pursuit of fleeing suspects, see §4.82.

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§8.14 b. Immunities

There are several specific statutory immunity provisions in addition to the general statutory immunities that protect police, law enforcement, and correctional activities of public entities against potential tort liabilities. These include immunity for the following:

- Acts in good faith, without malice, under unconstitutional, invalid, or inapplicable enactment (Govt C §820.6; see *O'Toole v Superior Court (San Diego Community College Dist.)* (2006) 140 CA4th 488, 503, 44 CR3d 531 (police not liable for enforcing unconstitutional permit requirement restricting free speech); Govt Tort Liability §§10.59-10.60);
- Injuries by and to prisoners (Govt C §844.6; see *Teter v City of Newport Beach* (2003) 30 C4th 446, 133 CR2d 139 (immunity applies despite prisoner's later acquittal); California Government Tort Liability Practice §§4.26-4.34 (4th ed Cal CEB 1999); see also *Ashker v California Dep't of Corrections* (9th Cir 1997) 112 F3d 392 (prisoner could maintain assault and battery claim against guard who shot him and medical malpractice claim against doctor who treated him; Eleventh Amendment barred claim against state for civil rights violation, but not state law tort claims, even though state obliged to indemnify guard and doctor);
- Failure to provide prison, jail, or correctional facilities (Govt C §845.2; see Govt Tort Liability §11.36);
- Determinations relating to parole and release of prisoners (Govt C §845.8; *Swift v Department of Corrections* (2004) 116 CA4th 1365, 11 CR3d 406; see Govt Tort Liability §§11.37-11.42);
- Injuries caused by escaped or escaping persons (Govt C §845.8; see Govt Tort Liability §§11.43-11.45);
- Failure to provide police protection (Govt C §845; see Govt Tort Liability §§11.46-11.50); and
- Failure to arrest a suspect or failure to retain an arrested person in custody (Govt C §846; see Govt Tort Liability §11.51).

A statute establishing public entity liability may prevail over an immunity statute. See, *e.g., Thomas v City of Richmond* (1995) 9 C4th 1154, 40 CR2d 442 (public agency's liability for personal injuries under Veh C §17004 prevails over its immunity from liability under Govt C §845.8 and applies to fleeing suspect as well as to innocent third party, except as otherwise provided in Veh C §17004.7). See discussion of police pursuits in §4.82. This exception to immunity does not apply to injuries sustained, or caused, by an escaping prisoner if the injury was not proximately caused by the operation of the entity's vehicle. *Ladd v County of San Mateo* (1996) 12 C4th 913, 923, 50 CR2d 309 (fleeing prisoner injured while attempting to climb on a moving train). See Govt Tort Liability §§11.3-11.57.

No immunity is provided by the fact that an officer's tortious conduct conformed to the entity's policies and orders, and training and training materials, unless reliance on the policy was objectively reasonable. See *California Attorneys for Criminal Justice v Butts* (9th Cir 1999) 195 F3d 1039, 1049 (officers civilly liable for not giving *Miranda* warnings).

On the distinctions between an officer's liability for false arrest (Govt C §820.4) and immunity for malicious prosecution (Govt C §821.6), and on the differences between federal and California law, see *Asgari v City of Los Angeles* (1997) 15 C4th 744, 752, 63 CR2d 842. See also *Ogborn v City of Lancaster* (2002) 101 CA4th 448, 460, 124 CR2d 238 (federal doctrine of qualified governmental immunity not extended to state court claim against public entity employees); *County of Los Angeles v Superior Court* (2000) 78 CA4th 212, 92 CR2d 668 (damages for false arrest and imprisonment and for violation of federal civil rights).

The qualified immunity from liability that may be asserted against a lawsuit based on violation of civil rights under 42 USC §1983 is not available to police officers and their employers sued under CC §52.1, a state civil rights law. *Venegas v County of Los Angeles* (2007) 153 CA4th 1230, 63 CR3d 741 (plaintiffs mistakenly stopped and arrested for car theft). In addition, qualified immunity does not exonerate an officer who fabricates evidence. *McSherry v City of Long Beach* (9th Cir 2009) 560 F3d 1125 (damages claim by person exonerated by DNA evidence after serving 14 years).

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2. Fire Protection Activities

§8.15 a. Liability

Although several general as well as specific immunities may apply, fire service activities may constitute a basis for tort liability of both public employees and public entities. Liability may be based on the following:

- A dangerous condition of public property (Govt C §§835-835.4; see §§8.18-8.25; Govt Tort Liability §§11.58, 11.70-11.73);
- Failure to discharge a mandatory duty imposed by enactment (Govt C §815.6; see §8.9; Govt Tort Liability §§9.25-9.44); and
- Negligence (Govt C §815.2; see §8.5; Govt Tort Liability §§9.7-9.17).

See Govt Tort Liability §§11.58-11.61.

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§8.16 b. Immunities

The following general immunities are available in connection with fire protection activities:

- Immunity in enforcing the law (Govt C §§818.2, 821);
- Immunity for acts and omissions relating to the grant or denial of licenses and permits (Govt C §§818.4, 821.2);
- Immunity for failing to make an inspection or for making an inadequate or negligent inspection for health and safety hazards (Govt C §§818.6, 821.4);
- Immunity for acts and omissions resulting from an exercise of discretion vested in them (Govt C §820.2); and
- Immunity for authorized trespass on private property to carry out legal duties (Govt C §821.8).

Specific immunities included are immunity for the following:

- Failure to "establish a fire department or otherwise to provide fire protection service" (Govt C §850);
- Failure to "provide or maintain sufficient personnel, equipment or other fire protection facilities" (Govt C §850.2); and
- Injuries "resulting from the condition of fire protection or firefighting equipment or facilities" (Govt C §850.4; see *State v Superior Court (Nagel)* (2001) 87 CA4th 1409, 105 CR2d 499 (immunity for negligently maintaining firefighting plane and negligently instructing or advising pilot)), although this immunity does not exonerate an entity from liability under inverse condemnation principles when a pipe supplying a fire hydrant bursts, causing damage to a building, and the entity maintained such pipes under a "replace it when it breaks" plan. See *Pacific Bell v City of San Diego* (2000) 81 CA4th 596, 96 CR2d 897.

See Govt Tort Liability §§11.58-11.74.

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§8.17 3. Other Areas of Liability

Other significant areas of liability and immunity set forth in the Tort Claims Act are the following:

- Medical, hospital, and public health activities (see Govt Tort Liability §§11.75-11.121);
- Administration of tax laws (see Govt Tort Liability §§11.122-11.125);
- Pesticide use (see Govt Tort Liability §§11.126-11.127);
- Injuries caused by motor vehicles (see Govt Tort Liability §§11.128-11.146); and
- Activities to abate impending peril (see Govt Tort Liability §§11.147-11.148).

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III. LIABILITY FOR DANGEROUS CONDITION OF PUBLIC PROPERTY

§8.18 A. Liability in General

Subject to certain statutory defenses and immunities, a public entity is liable for an injury legally caused (see §1.15) by a dangerous condition of its property if a risk of that kind of injury was reasonably foreseeable and *either* the entity's employee negligently or wrongfully created the dangerous condition within the scope of his or her employment, *or* the entity had actual or constructive notice of the condition in time to have taken protective measures. Govt C §835. *Bonanno v Central Contra Costa Transit Auth.* (2003) 30 C4th 139, 146, 132 CR2d 341 (placing bus stop at location that required patrons to cross busy thoroughfare at uncontrolled intersection created dangerous condition). See *Curtis v State* (1982) 128 CA3d 668, 691, 180 CR 843.

Obtaining a finding that public property was in a dangerous condition at the time of an injury does not establish public entity liability in the face of findings that the public entity (and its employees) did not create the condition and that the entity did not have notice of the condition long enough to have protected against the danger. *Metcalf v County of San Joaquin* (2008) 42 C4th 1121, 1129, 72 CR3d 382 (intersection near railroad track).

Public entity liability for an injury caused by a defective condition of public property must be based on Govt C §§830-835.4, not on a theory of respondeat superior for a public employee's negligent failure to repair or correct the condition. *Longfellow v County of San Luis Obispo* (1983) 144 CA3d 379, 383, 192 CR 580, 582. Liability depends on proof of the requisite statutory elements.

Generally, an entity is not liable for injury caused by natural hazards (see §§8.33-8.34), for failing to warn user of public property about such hazards, or for encouraging a person to use public property that has natural hazards. See *Lupash v City of Seal Beach* (1999) 75 CA4th 1428, 89 CR2d 920 (youth injured when uneven ocean floor caused him to fall while participating in a city-sponsored junior lifeguard program failed to establish basis for entity liability). See generally Govt Tort Liability §§12.3-12.14.

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§8.19 1. Definition of Dangerous Condition

A dangerous condition is one that creates a substantial (rather than minor, trivial, or insignificant) risk of injury when the property or adjacent property is used with due care in a reasonably foreseeable manner. Govt C §830(a). See Govt Tort Liability §12.15. See also Govt Tort Liability §§12.16, 12.20-12.31 for analysis of each of these factors as well as statutory qualifications affecting this definition.

In short, public property is in a dangerous or defective condition when it involves an unreasonable risk of injury to the public. *Pfeifer v County of San Joaquin* (1967) 67 C2d 177, 182, 60 CR 493. See *Stathoulis v City of Montebello* (2008) 164 CA4th 559, 78 CR3d 910 (question of fact whether potholes that caused plaintiff to trip and fall were trivial defect); *Vedder v County of Imperial* (1974) 36 CA3d 654, 111 CR 728 (to permit combustibles to collect on public property when there was no available means to prevent or control fires created nuisance and dangerous condition).

Property is not in a dangerous condition if the risk of injury arises solely when it is negligently used in a manner that was not reasonably foreseeable. *Biscotti v Yuba City Unified Sch. Dist.* (2007) 158 CA4th 554, 69 CR3d 825 (9-year-old boy cut arm while standing on his bicycle, reaching over chain link fence to pick oranges); *Milligan v Golden Gate Bridge Highway & Transp. Dist.* (2004) 120 CA4th 1, 15 CR3d 25 (district not liable to survivors of teenage girl who jumped to her death after climbing over 3½-foot railing); *Schonfeldt v State* (1998) 61 CA4th 1462, 72 CR2d 464 (15-year-old who climbed over freeway fence and was hit by truck used freeway in negligent and unforeseeable way; state not liable even though fence was 4½ feet high, less than recommended 6 feet, there were no warning signs, and pedestrian tunnel was unlit and muddy). But this does not mean that the plaintiff must plead or prove freedom from contributory negligence. *Holmes v City of Oakland* (1968) 260 CA2d 378, 386, 67 CR 197, 202. The plaintiff's manner of using the property is reasonably foreseeable if it is an established or known use, even if not one initially intended. See *Holder v City of Santa Ana* (1962) 205 CA2d 194, 198, 22 CR 707, 710 (decided under prior law).

Whether government property is in a dangerous condition depends on the circumstances and is ordinarily a question of fact. *Harland v State* (1977) 75 CA3d 475, 484, 142 CR 201, 206 (no median barrier on curved bridge). See *Barone v City of San Jose* (1978) 79 CA3d 284, 144 CR 836. In some cases, however, a court may properly decide the matter as one of law. *Pfeifer v County of San Joaquin* (1967) 67 C2d 177, 184, 60 CR 493, 498. See *McKray v State* (1977) 74 CA3d 59, 141 CR 280; *Drummond v City of Redondo Beach* (1967) 255 CA2d 715, 719, 63 CR 497, 500 (washout at edge of street not dangerous).

NOTE: An entity's conduct of a fundraising event on private property, creating hazardous traffic conditions on public roads, can subject the entity to dangerous condition liability. See *Essex Ins. Co. v City of Bakersfield* (2007) 154 CA4th 696, 65 CR3d 1 (city entitled to coverage of potential liability for injury to drivers on access road despite policy exclusions for damages resulting from ownership or use of automobiles).

Public entity liability cannot ordinarily be based on a dangerous condition created by a third party's criminal conduct. *City of San Diego v Superior Court (Hanson)* (2006) 137 CA4th 21, 40 CR3d 26 (nonparticipant killed by car involved in illegal street race on straight, level roadway that had no traffic controls or speed bumps; lack of lighting had no effect on racers' conduct). Further, the absence of metal detectors in a county courthouse is not a dangerous condition under Govt C §835. See *Zelig v County of Los Angeles* (2002) 27 C4th 1112, 1137, 119 CR2d 709 (no duty to make it impossible for one family law litigant to shoot another; see §8.13).

See Govt Tort Liability §12.16 for various definitions of "condition of property."

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§8.20 2. Substantial Risk of Injury

It is essential in characterizing a condition as dangerous to assess the substantial risk of injury presented by the property. The condition need not exist continuously and may arise only at certain times or under certain conditions that combine with the property's physical attributes to make it hazardous to reasonably careful users. See, *e.g., Erfurt v State* (1983) 141 CA3d 837, 190 CR 569 (highway at accident site was dangerous for 15 to 25 minutes a day for 20 days a year when glare from sun tended to blind drivers approaching abutment in center of "Y" division of highway).

The statutory definition of "dangerous condition" excludes a condition that creates minor, trivial, or insignificant risks. Govt C §830(a). Whether the defect is too trivial to be dangerous may be decided as a matter of law. See *Whiting v City of National City* (1937) 9 C2d 163, 165, 69 P2d 990 (establishing the "trivial defect" doctrine); *Davis v City of Pasadena* (1996) 42 CA4th 701, 704, 50 CR2d 8 (as matter of law, stair steps converging with handrail at right angle was not dangerous condition); *Fielder v City of Glendale* (1977) 71 CA3d 719, 734, 139 CR 876.

Under Govt C §830.2, a condition can be dangerous only if it creates a hazard to those who foreseeably will use the property with due care. *Sambrano v City of San Diego* (2001) 94 CA4th 225, 114 CR2d 151 (entity not liable to child burned by hot coals covered with sand in concrete fire ring at public beach; see §8.25).

See Govt Tort Liability §§12.20-12.22.

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§8.21 3. Conditions on Adjacent Property

Public property may be dangerous because of the condition of adjacent public or private property. Govt C §830(a). *Bonanno v Central Contra Costa Transit Auth.* (2003) 30 C4th 139, 148, 132 CR2d 341 (placing bus stop at location that required patrons to cross busy thoroughfare at uncontrolled intersection created dangerous condition; bus stop owner could be liable even if injury occurred on adjacent property as plaintiff was headed toward bus stop); *Joyce v Simi Valley Unified Sch. Dist.* (2003) 110 CA4th 292, 298, 1 CR3d 712 (open school gate that encouraged students to cross dangerous intersection could be dangerous condition). See Govt Tort Liability §12.18. This danger includes the risk created by the public property condition, which may extend beyond the boundaries and endanger nearby persons or property. See *Milligan v City of Laguna Beach* (1983) 34 C3d 829, 196 CR 38 (trees on city property fell on residence on adjacent property). A public entity may be required to guard against traffic hazards arising from conditions existing off the traveled portion of its road. *Briggs v State* (1971) 14 CA3d 489, 499, 92 CR 433, 440 (mudslide on highway).

An entity is not ordinarily liable for injury or death caused by the ocean adjacent to public property (see §10.13), but may be liable for failing to warn the users of a publicly operated beach park of the dangers posed by the strong undertow associated with ocean waters that wash over the beach. *Pacheco v U.S.* (9th Cir 2000) 220 F3d 1126 (giving toy buckets to persons paying for access to beach amounted to inviting them to play in water).

See §10.40 on liability for injuries that occur on adjacent property, caused by conditions on an entity's property.

See Govt Tort Liability §§12.23-12.25.

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§8.22 4. Due Care Analysis

A user of public property who establishes that a condition of the property creates a substantial risk to any foreseeable user who uses it with due care has established the existence of a dangerous condition; proof that the plaintiff/user was not exercising due care is a separate issue that the entity can raise as a defense. *Alexander v State* (1984) 159 CA3d 890, 902, 205 CR 758, 765 (highway intersection); *Swaner v City of Santa Monica* (1984) 150 CA3d 789, 809, 198 CR 208, 220 (plaintiff illegally sleeping on beach injured by tortfeasor illegally diving on beach); *Mathews v State* (1978) 82 CA3d 116, 121, 145 CR 443, 447 (traffic signal had been stuck for hours; plaintiff not required to show that driver who came through red was using due care).

See Govt Tort Liability §§12.26-12.29.

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§8.23 5. Reasonably Foreseeable Manner of Use

A property condition is dangerous only if it creates a substantial risk of injury when the property or adjacent property is used with due care "in a manner in which it is reasonably foreseeable that it will be used." Govt C §830(a). The test is whether the condition is dangerous to *all foreseeable users,* not just to persons who are intended users of the property. The liability extends even to persons who "use the property for a purpose for which it is not designed to be used or for a purpose that is illegal." California Law Revision Commission Comment to Govt C §830. See *Davis v Cordova Recreation & Park Dist.* (1972) 24 CA3d 789, 101 CR 358.

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§8.24 6. Causation

Although to recover it must be shown that an injury was proximately caused by the dangerous condition, it need not be established that that condition was the sole or exclusive cause of the injury. See *Stanford v City of Ontario* (1972) 6 C3d 870, 101 CR 97.

If the condition of the property was a proximate cause of the injury, concurrent negligence of a claimant or third person will not break the chain of causation relieving a public entity from liability for a dangerous condition. See *Peterson v San Francisco Community College Dist.* (1984) 36 C3d 799, 205 CR 842.

See Govt Tort Liability §§12.36-12.40.

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§8.25 7. Actual or Constructive Notice

To be found liable for a dangerous condition it did not create, a public entity must have had either actual or constructive notice of it. Govt C §§835(b), 835.2. Actual notice may be established by showing that a public employee knew of the particular dangerous condition that caused the injury. See Govt C §835.2(a); *Stanford v City of Ontario* (1972) 6 C3d 870, 101 CR 97 (entity had constructive knowledge of dangerous condition that could have been seen by city inspector had he visited site before worker was injured in unshored excavation). See also *Sambrano v City of San Diego* (2001) 94 CA4th 225, 114 CR2d 151 (knowledge that users sometimes doused beach fires with sand, thus covering hot coals, insufficient basis for entity liability); *State v Superior Court (Rodenhuis)* (1968) 263 CA2d 396, 399, 69 CR 683, 686 (general knowledge that people often leave hot coals on beach not enough).

Constructive notice of a dangerous condition (see Govt C §835.2(b)) may be imputed to an entity when an obvious danger existed for an adequate period of time before the accident to have permitted the entity to have discovered and remedied the situation. *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 842, 206 CR 136, 142 (privately erected sign obscured view at intersection).

A general allegation that the entity "knew or should have known of the dangerous condition of" the specific property sufficiently pleads actual knowledge under Govt C §835.2, although underlying facts must be alleged to plead constructive notice of the condition. *Delta Farms Reclamation Dist. v Superior Court* (1983) 33 C3d 699, 712, 190 CR 494, 502.

See Govt Tort Liability §§12.45-12.51, 12.113-12.114. See Govt Tort Liability §12.52 for discussion of sufficiency of notice required to take protective measures.

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Source: Torts/California Tort Guide/8 Governmental Liability/§8.26 B. Available Defenses

§8.26 B. Available Defenses

A public entity may assert any defense available to a private defendant in a similar situation. Govt C §815(b). Such defenses include comparative negligence (see §8.27), assumption of risk (see §8.28), and third party negligence (see §8.29). Also available are certain statutory defenses such as reasonableness of the act or omission creating the condition (Govt C §835.4(a); see Govt Tort Liability §§12.61-12.62), and the reasonableness of protective measures (Govt C §835.4(b); see Govt Tort Liability §§12.63-12.65).

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§8.27 1. Comparative Negligence

Comparative negligence is the most important defense available to both private and public defendants in dangerous condition actions. The doctrine of comparative negligence was held to be specifically applicable to dangerous condition actions under the Tort Claims Act in *Levine v City of Los Angeles* (1977) 68 CA3d 481, 137 CR 512.

See Govt Tort Liability §12.58.

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§8.28 2. Assumption of Risk

A public entity may assert as a complete defense to a personal injury or wrongful death damages lawsuit based on a dangerous condition of public property (1) a pre-injury exculpatory agreement, at least one not contrary to a public interest (see §1.54), or (2) at least when the use of the property is for a sport or recreational activity, a primary assumption of risk (see §§1.46-1.53). Other forms of conduct that assume a risk are treated as comparative fault, apportionable among the parties (see §1.43).

See Govt Tort Liability §12.59.

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§8.29 3. Third Party Negligence

If third party negligence constitutes a superseding cause that breaks the chain of causation, it is a total defense. *Akins v County of Sonoma* (1967) 67 C2d 185, 60 CR 499.

Foreseeable negligence or a third party's criminal conduct may be the very risk that makes the property dangerous in conjunction with some particular feature of the property, such as the lack of a fence or barrier that would keep the third party out, although that party's unforeseeable conduct may break the chain of causation between the entity's maintenance of a dangerous condition and the injury. *Swaner v City of Santa Monica* (1984) 150 CA3d 789, 804, 198 CR 208, 217 (city failed to fence parking lot to keep vehicles from driving onto beach). The mere presence on the property of criminal elements, however, does not constitute a dangerous condition. *Rodriguez v Inglewood Unified Sch. Dist.* (1986) 186 CA3d 707, 230 CR 823. See *Turner v State* (1991) 232 CA3d 883, 284 CR 349.

A dangerous condition such as inadequate lighting can, combined with the conduct of third parties, be a concurrent proximate cause of injuries incurred by a person who is assaulted on public property. See *Peterson v San Francisco Community College Dist.* (1984) 36 C3d 799, 809, 205 CR 842, 848 (failure to trim foliage near parking lot created dangerous condition when combined with third party's criminal conduct); *Zuniga v Housing Auth.* (1995) 41 CA4th 82, 95, 48 CR2d 353 (failure to protect public housing residents from criminal conduct on premises; special relationship between housing authority and residents); *Slapin v Los Angeles Int'l Airport* (1976) 65 CA3d 484, 490, 135 CR 296, 299 (failure to provide adequate lighting created dangerous condition). See also *Branch v State ex rel Dep't of Transp.* (1984) 159 CA3d 340, 345, 205 CR 482, 484 (woman abducted to and assaulted on public property showed no injury from dangerous condition of property).

See Govt Tort Liability §12.60. Anno, 73 ALR4th 496 (1989) (injury from playground equipment at public park).

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C. Statutory Immunities

§8.30 1. Design Immunity

Under the design immunity of Govt C §830.6, a public entity is not liable for an injury caused by a defect in the plan or design of a public improvement if

- a causal relationship existed between the plan or design and the accident;
- the entity or an employee exercising discretionary authority approved in advance the plan, design, or standards for it; and
- substantial evidence supports the reasonableness of the plan or design.

Cornette v Department of Transp. (2001) 26 C4th 63, 66, 109 CR2d 1 (court must decide third element, reasonableness of plan or design; see below on loss of immunity issues as jury questions). See *BART Dist. v Superior Court* (1996) 46 CA4th 476, 481, 53 CR2d 906; *Anderson v City of Thousand Oaks* (1976) 65 CA3d 82, 135 CR 127; *Callahan v City & County of San Francisco* (1971) 15 CA3d 374, 380, 93 CR 122, 126.

Design immunity is an affirmative defense that the public entity must plead and prove. *Cameron v State* (1972) 7 C3d 318, 325, 102 CR 305. For design immunity to apply, the entity must prove that the improvement, as constructed, was the result of or conformed to a design that was approved by a public entity vested with discretionary authority. 7 C3d at 326, 102 CR at 310 (entity approved design for right of way; design contained nothing about superelevation of roadway, which was claimed as dangerous condition). The applicability of the immunity is an issue of law for the court to decide. Govt C §830.6.

Whether the entity has met the requirement that substantial evidence must support the reasonableness of the plan or design is a matter of law for the court to decide. Govt C §830.6; *Cornette v Department of Transp.* (2001) 26 C4th 63, 74, 109 CR2d 1. See *Laabs v City of Victorville* (2008) 163 CA4th 1242, 78 CR3d 372 (evidence of reasonableness of approved design derived from expert's declaration presented by plaintiff).

On the other hand, if there is conflicting evidence, a jury must decide whether (1) the entity or an employee exercising discretionary authority approved in advance the plan, design, or standards for it and (2) a causal relationship existed between the plan or design and the accident. *Hernandez v Department of Transp.* (2003) 114 CA4th 376, 388, 7 CR3d 536 (absence of guard rail on freeway offramp). See *Arreola v County of Monterey* (2002) 99 CA4th 722, 757, 122 CR2d 38 (state failed to establish design immunity defense in suit for floodwater damage after levee failure).

The entity must offer substantial evidence that the design was reasonable in view of the foreseeable use of the property. *Davis v Cordova Recreation & Park Dist.* (1972) 24 CA3d 789, 101 CR 358. It must also show that the factor that caused the accident was a part of the design that was approved. *De La Rosa v County of San Bernardino* (1971) 16 CA3d 739, 747, 94 CR 175, 181 (stop sign obscured by trees was not part of approved design). See *Fuller v Department of Transp.* (2001) 89 CA4th 1109, 107 CR2d 823 (design immunity applies to setting speed limits).

Design immunity applies only to completed projects; the immunity does not apply to a temporary dangerous condition that arises during the construction of an improvement. *Winig v State* (1995) 37 CA4th 1772, 1777, 45 CR2d 652.

See Govt Tort Liability §§12.66-12.74.

Effect of Changed Conditions

The approved design immunity may be lost if the plan or design, under changed conditions, has resulted in a dangerous condition, unless the entity has not had a reasonable time to obtain funds and to carry out remedial work, or was unable to remedy the condition due to practical impossibility or lack of funds and reasonably attempted to provide adequate warnings of the dangerous condition. Govt C §830.6.

The entity has an initial burden of showing that a design immunity that initially applied still existed at the time of the accident. *Baldwin v State* (1972) 6 C3d 424, 429, 99 CR 145. The plaintiff must then show that (1) the plan or design has become dangerous because of a change in physical conditions, (2) the entity had actual or constructive notice of the dangerous condition thus created, and (3) the entity had a reasonable time to obtain the funds and carry out the

necessary remedial work to bring the property back into conformity with a reasonable design or plan, or, if the entity was unable to remedy the condition because of practical impossibility or lack of funds, had not reasonably attempted to provide adequate warnings. *Cornette v Department of Transp.* (2001) 26 C4th 63, 66, 109 CR2d 1 (plaintiff has right to jury trial on loss of design immunity issues). See *Mirzada v Department of Transp.* (2003) 111 CA4th 802, 4 CR3d 205 (evidence failed to support contention that approved design—no median barrier—had become dangerous); *Wyckoff v State* (2001) 90 CA4th 45, 108 CR2d 198 (plaintiff failed to establish changed circumstances); *Grenier v City of Irwindale* (1997) 57 CA4th 931, 945, 67 CR2d 454 (plaintiff's burden to show change in physical condition); *Higgins v State* (1997) 54 CA4th 177, 188, 62 CR2d 459 (plaintiff's burden to show notice that changes rendered condition dangerous).

NOTE: See *Bane v State* (1989) 208 CA3d 860, 869, 256 CR 468, which suggests that, under 1979 legislation, design immunity terminates if the design was unreasonable for any reason (not just for changed physical conditions) once the public entity has notice of the dangerous condition and sufficient time to remedy it. But see *Alvarez v State* (1999) 79 CA4th 720, 736, 95 CR2d 719 (court that decided *Bane* rejects suggestion, holds that plaintiff must show changed physical conditions; questioned on another point in *Hernandez v Department of Transp.* (2003) 114 CA4th 376, 383, 7 CR3d 536); *Sutton v Golden Gate Bridge Highway & Transp. Dist.* (1998) 68 CA4th 1149, 1157, 81 CR2d 155 (design immunity elements established; irrelevant that study did not consider moveable median barrier; *Bane* implication that immunity ends when it becomes apparent that design has created dangerous condition rejected); *Dole Citrus v State* (1997) 60 CA4th 486, 70 CR2d 348 (employer seeking reimbursement for workers' compensation paid to injured employee failed to raise triable issue of fact regarding change in physical conditions).

See Govt Tort Liability §§12.66-12.74.

See generally Davis, *Design Immunity: Understanding How to Avoid, Limit and Defeat a Design Immunity Defense,* 36 CAOC Forum No. 2, p 18 (Consumer Attorneys of California), Mar. 2006.

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§8.31 2. Traffic Signals, Signs, and Markings; Warning Signals

The Government Code distinguishes warning signals, markings, and devices (see Govt C §830.8) from regulatory signals, signs, and markings. See *Dahlquist v State* (1966) 243 CA2d 208, 213, 52 CR 324, 327.

A public entity may be liable for failure to provide a warning sign if one was necessary to warn of a danger not reasonably apparent to a prudent motorist. See Govt C §830.8; *Anderson v City of Thousand Oaks* (1976) 65 CA3d 82, 93, 135 CR 127, 133 (circumstances constituting trap for motorists). The plaintiff must show a dangerous condition as statutorily defined. *Pfeifer v County of San Joaquin* (1967) 67 C2d 177, 184, 60 CR 493, 498.

A public entity can be liable under Govt C §830.8 for failing to post a sign to warn of a dangerous condition. *Cameron v State* (1972) 7 C3d 318, 327, 102 CR 305, 311. An entity is also liable for posting an inadequate or misleading sign. *Bunker v City of Glendale* (1980) 111 CA3d 325, 328, 168 CR 565, 567 (sign saying "Slow to 15 Miles an Hour" found to be inadequate to warn of sharp drop of road on other side of hill crest); *Briggs v State* (1971) 14 CA3d 489, 497, 92 CR 433, 439 (signs warning of mudslide on highway did not meet size or other state specifications). Signage that is part of an approved design (see §8.30), however, does not support dangerous condition liability. *Weinstein v Department of Transp.* (2006) 139 CA4th 52, 42 CR3d 417 (signage for "lane drop" conformed to approved design; standards permitted, but did not require, median-side sign).

Failure to install a regulatory traffic control signal does not by itself produce a dangerous condition. Govt C §830.4; *Brenner v City of El Cajon* (2003) 113 CA4th 434, 439, 6 CR3d 316 (immunity not defeated by showing that vehicular and pedestrian traffic at intersection had increased); *City of S. Lake Tahoe v Superior Court* (1998) 62 CA4th 971, 73 CR2d 146 (because city had no duty to provide stop sign at intersection, it could not be liable for injury resulting from its failure to replace sign that had been knocked down some hours earlier); *Durham v City of Los Angeles* (1979) 91 CA3d 567, 577, 154 CR 243, 248 (no liability for failure to post sign warning persons on street not to go too close to railroad track). See *Cerna v City of Oakland* (2008) 161 CA4th 1340, 75 CR3d 168 (dangerous condition not shown by lack of traffic signal, crossing guards, and painted yellow markings at crosswalk used by students). See also *Sun v City of Oakland* (2008) 166 CA4th 1177, 1192, 83 CR3d 372 (city not liable for failing to re-mark what had once been marked crosswalk); *Plattner v City of Riverside* (1999) 69 CA4th 1441, 82 CR2d 211 (city had no duty to install streetlight near crosswalk, thus no duty to keep lit one that had been installed). See Anno, 111 ALR5th 579 (2003) (public utility or entity liability for injury resulting from inoperative, malfunctioning, or defective streetlight).

In some circumstances, however, an entity may be liable for negligent installation or maintenance of a regulatory device. See *Teall v Cudahy* (1963) 60 C2d 431, 434, 34 CR 869, 871 (traffic signal placement endangered pedestrians). See also *Mathews v State* (1978) 82 CA3d 116, 121, 145 CR 443, 447 (traffic signal had been stuck for hours; plaintiff not required to show that driver who came through red light was using due care); *Gardner v City of San Jose* (1967) 248 CA2d 798, 803, 57 CR 176, 179 (unlighted pedestrian subway).

On the ability of a public entity to seek indemnification from a private landowner adjacent to a public road for the failure to erect traffic signals, see *City of El Segundo v Bright* (1990) 219 CA3d 1372, 269 CR 1. See also §10.41 on whether a developer can be liable to a motorist for the developer's failure to install traffic signals at an intersection.

See Govt Tort Liability §§12.75-12.79.

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§8.32 3. Effect of Weather

A public entity is not liable for an injury caused by the result of weather conditions on streets or highways, but the entity is not exonerated from liability caused by the result if it would not be reasonably apparent to, or anticipated by, a person using due care. Govt C §831. See *Flournoy v State* (1969) 275 CA2d 806, 811, 80 CR 485, 489 (negligent failure to warn that ice collected in basin on bridge). But see *Clarke v Michals* (1970) 4 CA3d 364, 372, 84 CR 507, 512 (no evidence entity had notice of ice on bridge).

The "weather immunity" in Govt C §831 does not apply to the position of the sun. See *Erfurt v State* (1983) 141 CA3d 837, 845, 190 CR 569, 573 (driver blinded by rising sun at top of freeway incline). The state is not under a mandatory duty to maintain certain public roads and thus the weather immunity of §831 can be invoked to avoid liability for an accident caused by icy roads. See *Allyson v Department of Transp.* (1997) 53 CA4th 1304, 1318, 62 CR2d 490 (snow on highway was obvious); *Bossi v State* (1981) 119 CA3d 313, 320, 174 CR 93, 97 (Caltrans maintenance manual on snow and ice removal excluded as irrelevant). But see *Straughter v State* (1976) 89 CA3d 102, 152 CR 147 (evidence supported implied finding that state had constructive notice that ice had formed on highway, creating dangerous condition). See also Anno, 97 ALR3d 11 (1980) (ice or snow on roadways).

See Govt Tort Liability §§12.80-12.81.

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Source: Torts/California Tort Guide/8 Governmental Liability/§8.33 4. Natural Condition of Unimproved Property

§8.33 4. Natural Condition of Unimproved Property

A public entity is not liable for an injury caused by the following:

- A natural condition of unimproved public property, including waters and beaches (Govt C §831.2);
- A condition of certain unpaved roads or trails to recreational areas (Govt C §831.4(a)); or
- A condition of the unimproved and unoccupied portions of certain state property (Govt C §831.6).

See *Prokop v City of Los Angeles* (2007) 150 CA4th 1332, 59 CR3d 355 (bicyclist injured when he hit chain link fence next to bikeway designed by city); *Fuller v State* (1975) 51 CA3d 926, 936, 125 CR 586, 591 (boy dove from cliff in state park into shallow ocean water); *Osgood v County of Shasta* (1975) 50 CA3d 586, 123 CR 442 (water skier injured; shoreline was natural condition even though lake was man-made). See also §8.18 discussion of *Lupash v City of Seal Beach* (1999) 75 CA4th 1428, 89 CR2d 920 (entity not liable for injury to youth when uneven ocean floor caused him to fall; immunity statutes not raised).

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Source: Torts/California Tort Guide/8 Governmental Liability/§8.34 a. Natural Conditions

§8.34 a. Natural Conditions

The immunity provisions of Govt C §831.2 do not apply if the condition that caused injury is man made. *Buchanan v City of Newport Beach* (1975) 50 CA3d 221, 123 CR 338 (work on jetty affected slope of beach into water; surfer injured). However, human-altered conditions, especially those that have existed for some years, which merely duplicate models common to nature, may be considered to be "natural conditions" for the purposes of §831.2. *Tessier v City of Newport Beach* (1990) 219 CA3d 310, 314, 268 CR 233, 235 (sandbar created over many years by natural forces, although significantly affected by construction of jetty and deposit of sand and rock). See *Knight v City of Capitola* (1992) 4 CA4th 918, 928, 6 CR2d 874, 879 (city beach, although artificially rebuilt and altered by construction of rock groin 17 years earlier, was natural condition).

A river, even if it can be said to be owned or controlled by a public entity, is "unimproved public property." Likewise, an uprooted tree is a "natural condition" within the immunity provisions of Govt C §831.2. *County of Sacramento v Superior Court* (1979) 89 CA3d 215, 152 CR 391 (decedent drowned while floating down American River when root punctured his flotation device); see *Eben v State* (1982) 130 CA3d 416, 181 CR 714 (submerged rock near shoreline of artificial lake hit by water skier was natural condition).

Public beaches are deemed to be in a natural condition and unimproved despite the provision or absence of public safety services including, but not limited to, lifeguards, police, medical services, fire protection services, beach cleanup services, or signs. Govt C §831.21. The statute applies only to natural conditions of public property and does not limit any liability or immunity that might otherwise exist under the Tort Claims Act (Govt C §§810-996.9, governing claims and actions against public entities and employees).

Presumably, this means that "artificial" beaches or conditions would still not activate immunity under Govt C §831.2. It might also mean that public entities are not immune when injuries are caused by artificial conditions, such as misleading signs on a public beach. In such a case, the reliance induced by the sign, in addition to the condition of the beach or surf, is a major contributing cause of the injury. Another interpretation can be made, based on its language, that the statute merely states that the presence of "public safety services" will not transform a beach that is otherwise natural into something that is improved or artificial for the purpose of statutory immunity; it does not mean that public entities enjoy a blanket immunity in providing "public safety services" on public beaches.

NOTE: Government Code §831.21 applies only to causes of action based on acts or omissions occurring on or after January 1, 1988.

The immunity of Govt C §831.2 applies to unimproved property, such as a greenbelt, located within an urban area as well as property in rural and semirural areas. It is irrelevant whether the property was specifically designated for recreational or nonrecreational use. *Winterburn v City of Pomona* (1986) 186 CA3d 878, 231 CR 105.

Section 831.2 does not immunize an entity that owns unimproved property from liability to a person injured on adjacent property. *Milligan v City of Laguna Beach* (1983) 34 C3d 829, 833, 196 CR 38, 40 (trees on city land toppled onto house, causing property damage and emotional distress). Note, however, that Govt C §831.25 immunizes public entities and employees from liability for off-premises damage or injury caused by "land failure" (*e.g.,* landslide and subsidence) of unimproved public land, except for personal injury or for emotional distress accompanied by substantial physical injury, unless the entity had actual notice of probable damage and failed to give reasonable warning to affected property owners. See *Schooler v State* (2000) 85 CA4th 1004, 102 CR2d 343 (state not liable to adjacent property owner whose property was losing lateral support because state-owned bluff next to beach was eroding; erosion resulted from "natural condition" of unimproved public property even though pedestrians walked and dug on bluff). Section 831.25 also provides that neither a public entity nor a public employee is liable for any damage or injury arising from the giving of a warning under the statute. Govt C §831.25(d).

See Govt Tort Liability §§12.82-12.87.

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§8.35 b. Roads and Trails, Paved and Unpaved

Government Code §831.4 provides immunity from liability for injuries caused by the condition of certain paved and unpaved walkways, paths, and sidewalks leading to unimproved property. *Amberger-Warren v City of Piedmont* (2006) 143 CA4th 1074, 49 CR3d 631 (immunity applied to paved pathway in city dog park; covers design and location). Section 831.4 also provides immunity for injury caused by a condition of a "trail" used for specific recreational purposes. *Astenius v State* (2005) 126 CA4th 472, 23 CR3d 877 (immunity not limited to unimproved land; injury while driving off-highway vehicle on trail in vehicular recreation area); *Farnham v City of Los Angeles* (1998) 68 CA4th 1097, 80 CR2d 720 (paved bicycle path was "trail" within §831.4 immunity); *Giannuzzi v State* (1993) 17 CA4th 462, 21 CR2d 335 (state immune from liability to motorcyclist injured while riding on "previously established trail" on which state was alleged to have dumped "dirt pilings"). See *State v Superior Court* (*Young)* (1995) 32 CA4th 325, 328, 39 CR2d 1 (public entity absolutely immune from liability under Govt C §831.4 for injuries caused to horseback rider on recreational trail). But see *Treweek v City of Napa* (2000) 85 CA4th 221, 101 CR2d 883 (ramp leading to public boat dock not "trail" under §831.4).

Entities sued for failing to repair or reopen a closed public roadway so that it could be used as a fire road are immunized by Govt C §§850, 850.2, and 850.4 from liability to owners whose houses were damaged by widespread fire. *Cairns v County of Los Angeles* (1997) 62 CA4th 330, 72 CR2d 460 (entities' conduct did not create dangerous condition or nuisance).

See Govt Tort Liability §§12.82-12.89; Anno, 7 ALR4th 1129 (1981) (injuries on vacant or abandoned public property).

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§8.36 5. Recreational Use Immunity

Under Govt C §831.7 public entities and employees are immune from "hazardous recreational activity" (defined in the section) unless

- the entity or employee failed to warn of or guard against a known dangerous condition or other hazardous recreational activity;
- permission to participate in the activity was granted for a specific fee;
- the injury was caused by the entity's or employee's negligent failure to properly build or maintain a structure, equipment, or machinery used in the activity;
- the entity or employee recklessly promoted the participation in or observance of the activity; or
- the entity's or employee's act of gross negligence was a proximate cause of the injury.

See *Perry v East Bay Reg'l Park Dist.* (2006) 141 CA4th 1, 45 CR3d 477 (immunity barred recovery for death of 14-year-old who drowned after lifeguards had gone off duty); *Wood v County of San Joaquin* (2003) 111 CA4th 960, 4 CR3d 340 (fishing from canoe tethered to shore on public waterway also used by powerboats is "boating" within Govt C §831.7 definition of "hazardous recreational activity"); *Yarber v Oakland Unified Sch. Dist.* (1992) 4 CA4th 1516, 6 CR2d 437 (district immune from liability to plaintiff injured while playing basketball after hours in rented junior high school gym); *Berry v State* (1992) 2 CA4th 688, 3 CR2d 382 (state immune from liability to plaintiff injured while diving from tree stump into river); but see *Acosta v Los Angeles Unified Sch. Dist.* (1995) 31 CA4th 471, 37 CR2d 171 (as matter of law, school-sponsored extracurricular activities under supervision of school personnel do not qualify under Govt C §831.7 as "hazardous recreational activities." See also 81 Ops Cal Atty Gen 331 (1998) (entity immunity from liability for skateboarding outside a skateboard park not affected by entity's failure to post notice).

See Govt Tort Liability §§12.90-12.92. On private owners' recreational use immunity, see §§10.24-10.28.

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§8.37 6. Reservoirs, Canals, Conduits, and Drains

Liability for the condition of a reservoir, canal, conduit, or drain is limited to injuries in the course of an intended use unless the danger was concealed or latent. Govt C §831.8. See *Larson v Santa Clara Valley Water Conserv. Dist.* (1963) 218 CA2d 515, 522, 32 CR 875, 878 (water skiing was intended use).

Public entities other than "an irrigation district" or "the State" are not immunized by Govt C §831.8 for injuries caused by the condition of a canal, conduit, or drain. *Delta Farms Reclamation Dist. v Superior Court* (1983) 33 C3d 699, 702, 190 CR 494, 495 (waders drowned in canal). But see amendment to Govt C §831.8, operative from January 1, 1999, until January 1, 2002, extending immunity to specified public entities (and their employees) operating flood control and water conservation activities.

NOTE: Rules analogous to those for attractive nuisances apply to injuries to children in such situations. *Cardenas v Turlock Irrig. Dist.* (1968) 267 CA2d 352, 356, 73 CR 69, 71 (irrigation canal); *Hibbs v Los Angeles County Flood Control Dist.* (1967) 252 CA2d 166, 169, 60 CR 364, 366 (drainage canal).

See Govt Tort Liability §§12.93-12.99.

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IV. CLAIMS AGAINST PUBLIC ENTITIES AND EMPLOYEES

A. General Requirements

§8.38 1. When and How Claim Must Be Presented

A claim for death, personal injury, or damage to personal property or growing crops must be presented to a public entity within 6 months of accrual of the cause of action. Govt C §911.2. See *Lozada v City & County of San Francisco* (2006) 145 CA4th 1139, 1151, 52 CR3d 209 (peace officer suing for damages and civil penalties, as well as for declaratory and injunctive relief under Public Safety Officers' Procedural Bill of Rights (POBRA) (Govt C §§3300-3313)).

Because of the broad scope of the claim presentation and filing provisions of the California Tort Claims Act, it might better be called the "Government Claims Act." *City of Stockton v Superior Court (Civic Partners Stockton, LLC)* (2007) 42 C4th 730, 742, 68 CR3d 295 (suit for breach of contract). See *Baines Pickwick Ltd. v City of Los Angeles* (1999) 72 CA4th 298, 85 CR2d 74 (claims presentation requirements apply to all claims for money or damages, including claims for breach of contract; for these requirements, "tort claims act" is a misnomer); *Janis v California State Lottery Comm'n* (1998) 68 CA4th 824, 832, 80 CR2d 549 (requirement applies to Govt C §8880.4 claim in class action for money lost by Keno players); *Alliance Fin. v City & County of San Francisco* (1998) 64 CA4th 635, 642, 75 CR2d 341 (requirement applies to claim for breach of contract or money due under contract). But see *Long v City of Los Angeles* (1998) 68 CA4th 782, 80 CR2d 583 (claims provisions not applicable to action for recovery of specific personal property, some 525 birds and their cages, even if damages also sought for birds that expired in city's custody).

A claim for any other cause of action must be presented within 1 year of the accrual of the cause of action. Govt C §911.2. See *Westcon Constr. Co. v County of Sacramento* (2007) 152 CA4th 183, 61 CR3d 89 (contractor seeking extra pay for extra work on construction project failed to show substantial compliance within 1 year); *Wheeler v County of San Bernardino* (1978) 76 CA3d 841, 846, 143 CR 295, 298 (action for making and recording inaccurate survey was for damage to real property; 1 year to present claim). See also *Hart v County of Alameda* (1999) 76 CA4th 766, 780, 90 CR2d 386 (timely claim must precede action seeking return of unused jury fees).

NOTE: The purpose of the claims requirement is to "avoid litigation by settling meritorious claims." *Krainock v Superior Court* (1990) 216 CA3d 1473, 1477, 265 CR 715. The claim apprises the public entity of an imminent legal action so that the entity can investigate and evaluate the claim and settle the matter, if appropriate, prior to litigation. *Krainock v Superior Court, supra*. Such purposes are not involved when the action is on a judgment already rendered against the public entity; hence, the claims requirements do not apply to such an action. *Barkley v City of Blue Lake* (1996) 47 CA4th 309, 316, 54 CR2d 679.

A person or business who complies with provisions regarding contractual claims presentation need not also comply with statutory claims filing requirements to become entitled to sue the entity for money. *Arntz Builders v City of Berkeley* (2008) 166 CA4th 276, 82 CR3d 605.

A charter school is not a "public entity," and thus cannot invoke governmental claims filing requirements to defeat a damages lawsuit. *Knapp v Palisades Charter High Sch.* (2007) 146 CA4th 708, 53 CR3d 182 (sexual harassment suit against high school (nonprofit public benefit corporation), teacher, and chartering school district).

Although CCP §340.1 may sometimes extend the statue of limitations on filing lawsuits for childhood sexual abuse, it does not vitiate the requirement that a claim against a public entity for personal injury must be presented within 6 months of the date the cause of action accrued. *Shirk v Vista Unified Sch. Dist.* (2007) 42 C4th 201, 64 CR3d 210 (suit for molestation that ended in 1979 not supported by claim filed in 2003, shortly after health care practitioner told her she was still suffering psychological injury from 1977-79 molestation); *V.C. v Los Angeles Unified Sch. Dist.* (2006) 139 CA4th 499, 43 CR3d 103 (minor neither filed claim within 6 months nor applied for late claim relief within 1 year).

A claim, amendment to a claim, or an application for leave to present a late claim (see §8.47) must be presented to a local public entity by personal delivery to the public entity's clerk, secretary, or auditor, or by mailing it to the same or to the governing body at its principal place of business. Govt C §915(a). Such claims must be presented to the state by

delivery to an office of the State Board of Control or mailing to the State Board of Control at its principal office. See also §§915.2 (mailing of claim) and 915.4 (methods of giving notice). See Govt Tort Liability, chap 8, and Handling Claims Against Government Entities (Cal CEB Action Guide Winter 2000) for detailed information on how to present a claim.

NOTE: Filing a timely claim under the California Tort Claims Act may have the collateral effect of tolling the limitations period applicable to a federal civil rights lawsuit based on the same injury or death even if the California claim is not pursued. See *Lucchesi v Bar-O Boys Ranch* (9th Cir 2003) 353 F3d 691 (prisoner's death from asthma after mandatory physical activity; equitable tolling under three-pronged test).

See Anno, 45 ALR5th 173 (1997) (to whom must claim be presented).

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§8.39 2. When Claim Accrues

A cause of action accrues for government tort claims purposes just as it would for the running of the statute of limitations in an action between private litigants. Govt C §901. Usually, the cause of action accrues when the wrongful act occurs, not when the injury is subsequently discovered. *Collins v County of Los Angeles* (1966) 241 CA2d 451, 454, 50 CR 586 (false imprisonment). There are situations, however, in which a claim against a public entity accrues when the injured person first learns of the wrongful act attributed to the entity. See *Brandon G. v Gray* (2003) 111 CA4th 29, 35, 3 CR3d 330 (claim against county for falsely saying that no child abuse complaints had been made against day care facility accrued when parents learned that such complaints had been made, not earlier when children had been molested; also noted in §8.47). Further, a claim for repeated damage to real property based on theories of inverse condemnation and nuisance does not accrue until the situation has stabilized. *Lee v Los Angeles County Metro. Transit Auth.* (2003) 107 CA4th 848, 132 CR2d 444 (city water pipes undermining sidewalk and roadway).

For claim filing purposes, under the equitable delayed discovery rule of accrual, a cause of action may accrue when the plaintiff first learns that defendant's conduct was wrongful. See *K.J. v Arcadia Unified Sch. Dist.* (2009) 172 CA4th 1229, 92 CR3d 1 (student's claim against district for negligent supervision of teacher, alleging she had been seduced by him, accrued after psychotherapy in adulthood convinced her teacher's conduct was wrong). See also *Curtis T. v County of Los Angeles* (2004) 123 CA4th 1405, 21 CR3d 208 (cause of action by minor, alleging that foster parent had ignored sexual molestation between ages 5 and 8 by another child, accrued when minor's mother learned of it, assuming that the minor could truthfully allege that he lacked real awareness that what had happened to him was wrong).

NOTE: When the defendant is a public entity, CCP §340.1, which extended the statute of limitations for damages lawsuits for childhood sexual abuse (see §§1.29-1.30), does not obviate the need to have complied with claim presentation requirements. *Shirk v Vista Unified Sch. Dist.* (2007) 42 C4th 201, 64 CR3d 210. See discussion of *County of Los Angeles v Superior Court (N.L.)* (2005) 127 CA4th 1263, 26 CR3d 445, in §8.57.

In a medical malpractice suit, the cause of action accrues and the time for filing a claim begins to run when the plaintiff discovers the injury and its negligent cause, or should have discovered it; if the plaintiff is a minor, it is his parents' knowledge that determines the time of accrual. *Whitfield v Roth* (1974) 10 C3d 874, 885, 112 CR 540; *Martinez v County of Los Angeles* (1978) 78 CA3d 242, 245, 144 CR 123.

See Govt Tort Liability §§6.15-6.23.

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§8.40 3. Public Entity Must Provide Necessary Information

A public entity must furnish its name and address, and the names and addresses of its governing board members and other officers to the Secretary of State and to the county clerk of each county in which the entity has an office. Govt C §53051. The Secretary of State must index this information in the Roster of Public Agencies. Govt C §53051.

An entity's failure to comply excuses a plaintiff's failure to file a timely claim. Govt C §946.4; *Wilson v San Francisco Redev. Agency* (1977) 19 C3d 555, 138 CR 720 (plaintiff need not show that he was deceived or confused by agency's noncompliance). That failure can also cure defects in the content of a timely filed claim. *Cavalier Acres, Inc. v San Simeon Acres Community Serv. Dist.* (1984) 151 CA3d 798, 199 CR 4.

See Govt Tort Liability §§5.43-5.48. On a public entity's possible waiver of defects in a claim, see §8.44.

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§8.41 B. Form and Content of Claim

Under Govt C §910, the claim must specify the following:

- The claimant's name and post office address;
- The address to which notices are to be sent;
- The date, place, and other circumstances of occurrence giving rise to the claim;
- A description of the indebtedness, obligation, injury, damage, or loss incurred as presently known;
- The name(s) of public employee(s) causing the injury, damage, or loss if known; and
- If
  - the claim totals less than $10,000, the amount of the claim as of the date the claim is presented, or
  - the claim exceeds $10,000 at the time the claim is presented, no dollar amount should be included in the claim, although it must indicate whether the claim would be a limited civil case.

The claim must be signed by the claimant or by someone on his or her behalf. Govt C §910.2. See Govt C §§910.4 (claim forms provided by entity), 910.6 (amendment of claim). See Govt Tort Liability §6.44.

As long as a claim satisfies the general requirements of Govt C §910, the claim does not need the specificity of formal pleading. *Stockett v Association of Cal. Water Agencies Joint Powers Ins. Auth.* (2004) 34 C4th 441, 443, 20 CR3d 176 ("illegal motivation" theory, although not mentioned in claim for wrongful termination of employment, could be pursued; claim gave entity sufficient detail for investigation). Thus, a timely claim on a preprinted form mentioning injuries and "unspecified medical, lost income, future medical" is sufficient to support a later suit for personal injury damages; the nature and extent of injuries need not be stated. *Connelly v County of Fresno* (2006) 146 CA4th 29, 39, 52 CR3d 720 (summary judgment for entity reversed). The claim's purpose is to present sufficient detail to reasonably enable the public entity to make an adequate investigation of the claim's merits and to settle it without a lawsuit. *Blair v Superior Court* (1990) 218 CA3d 221, 267 CR 13 (public entity's claim form requested more information than required by statute; court held claimant not obligated to provide such information in claim). See Anno, 57 ALR5th 689 (1998) (sufficiency of notice's indication of time of accident).

NOTE: The statement of the "circumstances of the occurrence or transaction which gave rise to the claim" can limit the nature of the causes of action that can later be pleaded or pursued in a suit against an entity. See *Donohue v State* (1986) 178 CA3d 795, 224 CR 57 (judgment on pleadings for state). See §§8.55-8.56.

A letter from the injured person's attorney to the public employee whose vehicle collided with the plaintiff's car asking for the employee's version of the accident and suggesting that he forward the letter to his insurer was not sufficient to meet the claim presentation requirement and was insufficient grounds for late claim relief. *Del Real v City of Riverside* (2002) 95 CA4th 761, 115 CR2d 705.

See Govt Tort Liability §6.41.

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C. Consideration of Claim

§8.42 1. Response Time to Grant or Deny Claim

The government entity has 45 days in which to grant or deny a claim. Govt C §912.4(a). Failure to take action on the claim within that time constitutes rejection of the claim on the 45th day. Govt C §912.4(c).

If an action based on the claim has not yet begun, and it is not otherwise barred by the statute of limitations, extension of the 45-day limit may be allowed on written agreement between the claimant and the entity. Govt C §912.4(b). The time may also be extended if an amended claim is allowed; if a claim is amended, the public entity has 45 days after the date the amended claim was presented to grant or deny it (if entity fails to act, rejection is deemed to occur on 45th day after amended claim was presented). Govt C §§910.6, 912.4(a), (c).

The public entity must give written notice of its action, or its inaction, which is deemed rejection under Govt C §912.4. Govt C §913. The rejection notice must warn of the 6-month limit from the date the notice was personally delivered or deposited in the mail in which to file an action on the claim, but the form of notice provided in Govt C §913 is optional. Govt C §913. See *Chalmers v County of Los Angeles* (1985) 175 CA3d 461, 221 CR 19. See §8.44 (failure to notify may waive defects in the claim).

See Govt Tort Liability §§6.32-6.38.

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§8.43 2. Reconsideration of Claim

A public entity has the power to allow or compromise claims even after a claim has been rejected as long as an action has not yet been filed. See Govt C §§912.6, 912.8, 913.2.

See Govt Tort Liability §6.38.

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§8.44 D. Public Entity Must Notify Claimant of Defects

If a notice alerts a public entity to the existence of a claim for monetary damages and an impending lawsuit but fails to substantially comply with the claims presentation requirements of the Tort Claims Act (Govt C §§900-915.4), the entity must treat the notice as a defective "claim" that triggers the operation of Govt C §§910.8, 911, and 911.3. Under these sections, a public entity must notify a claimant of any insufficiencies of content or timeliness that prevent a claim as presented from satisfying the requirements of the Act. Failure to provide such notice to the claimant waives any defect based on insufficiencies in the claim. Govt C §911.3(b). See *Phillips v Desert Hosp. Dist.* (1989) 49 C3d 699, 263 CR 119.

See Govt Tort Liability §§6.32-6.34.

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§8.45 E. Assessing Substantial Compliance

Substantial compliance with the claim presentation requirements of Govt C §915 requires that a misdirected claim be "actually received" by the appropriate person or board within the time prescribed for presentation. *Munoz v State* (1995) 33 CA4th 1767, 39 CR2d 860. However, the presentation of a claim is in substantial compliance with the claims statutes if it satisfies the purposes of those statutes without prejudice to the government. *Carlino v Los Angeles County Flood Control Dist.* (1992) 10 CA4th 1526, 1533, 13 CR2d 437 (claim filed with Board of Supervisors met requirement; although district was separate entity, it was apparently controlled by supervisors).

An attempt to comply with claim-filing requirements amounts to substantial compliance only if the defective claim discloses on its face enough information "to reasonably enable the public entity to make an adequate investigation of the merits of the claim and to settle it without the expense of a lawsuit." *Pacific Tel. & Tel. Co. v County of Riverside* (1980) 106 CA3d 183, 188, 165 CR 29, 31 (employer's claim for reimbursement of workers' compensation death benefit to employee was not sufficient to permit employee's widow, who did not present a timely claim, to sue for wrongful death damages (quoting from *City of San Jose v Superior Court* (1974) 12 C3d 447, 456, 115 CR 797, 803)). Compare *Alliance Fin. v City & County of San Francisco* (1998) 64 CA4th 635, 75 CR2d 341 (attorney's letters to entity indicating that it should pay invoices to avoid necessity of litigation prevented summary judgment on ground that no claim had been filed), with *Schaefer Dixon Assoc. v Santa Ana Watershed Project Auth.* (1996) 48 CA4th 524, 532, 55 CR2d 698 (claimant's letters threatening litigation were insufficient to constitute claim). See also *Westcon Constr. Co. v County of Sacramento* (2007) 152 CA4th 183, 61 CR3d 89 (contractor seeking extra pay for extra work on construction project failed to show substantial compliance).

NOTE: A claimant who seeks late claim relief cannot concurrently argue substantial compliance with claim-filing requirements. See *Toscano v County of Los Angeles* (1979) 92 CA3d 775, 782, 155 CR 146, 149 (substantial compliance can be argued only after claimant has filed timely lawsuit alleging compliance). See §§8.47-8.53.

See Govt Tort Liability §§5.66-5.76.

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§8.46 F. Estoppel From Invoking Claims Statute

Conduct or representations by a public entity or its agents that induce a plaintiff to follow a course of inactivity and noncompliance with claims procedure may estop the entity from invoking the claims statute. *Rand v Andreatta* (1964) 60 C2d 846, 36 CR 846. See also *Fredrichsen v City of Lakewood* (1971) 6 C3d 353, 99 CR 13 (city estopped from objecting to filing of late claim after city clerk erroneously told claimant that a private party was responsible for defective sidewalk). However, mere silence or failure to advise the claimant of legal requirements does not ordinarily result in estoppel. *McGranahan v Rio Vista Joint Union High Sch. Dist.* (1964) 224 CA2d 624, 630, 36 CR 798, 801 (school district merely stated that it was insured). See *Jordan v City of Sacramento* (2007) 148 CA4th 1487, 56 CR3d 641 (erroneous advice accompanying denial of claim sent to plaintiff's attorney did not estop entity from asserting noncompliance with 6-month time limit); *Calabrese v County of Monterey* (1967) 251 CA2d 131, 140, 59 CR 224, 230 (misadvice by state officials not attributable to county).

The existence of an estoppel is a question of fact to be decided on a preponderance of evidence, and a trial court's decision is conclusive on appeal unless the opposite conclusion is the only one that could reasonably be drawn from the evidence. *Toscano v County of Los Angeles* (1979) 92 CA3d 775, 786, 155 CR 146, 152 (trial court concluded that claimants made conscious decision not to pursue claims). See *Ard v County of Contra Costa* (2001) 93 CA4th 339, 112 CR2d 886 (plaintiff should have been given chance to amend complaint to allege equitable estoppel).

See Anno, 64 ALR5th 519 (1997) (estoppel to assert, or waiver of, defects in claim).

See Govt Tort Liability §§5.80-5.83. On a public entity's possible waiver of defects in a claim, see §8.44.

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G. Grounds and Procedure for Late Claim Relief

§8.47 1. General Requirements for Application

A plaintiff who has failed to present a required claim within 6 months after accrual of the cause of action may apply to the public entity, in writing, for permission to file a late claim. This application, stating the reason for the delay, and with the claim attached, must be made within a reasonable time, not to exceed 1 year after the date the cause of action accrued. Govt C §911.4. In computing the 1-year time period, the time during which the injured person was a minor is counted, but the time during which the injured person is mentally incapacitated and does not have a guardian or conservator of the person is not counted, nor is the time, under specified circumstances, during which the person is detained or adjudged to be a dependent child of the juvenile court. Govt C §911.4(c). See §§8.51 (effect of minority), 8.52 (effect of mental or physical disability).

Presenting a claim to the public entity more than 6 months but less than 1 year after the claim accrued is not an adequate substitute for filing a timely application for permission to file a late claim; the court lacks jurisdiction to grant late claim relief if the application was not filed within 1 year. See *Brandon G. v Gray* (2003) 111 CA4th 29, 34, 3 CR3d 330 (legal malpractice action for attorney's failure to apply for leave to file late claim on time; also noted in §8.39).

The public entity's governing board must act on the application within 45 days. Govt C §911.6(a). The claim is considered presented when the application is granted, and the board then has 45 days in which to accept or reject the application to make a late claim. Govt C §§912.2, 912.4.

See Govt Tort Liability §§7.1-7.2.

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§8.48 2. Extensions of Time

The 45-day period within which an entity must act on an application for late claim relief can be extended by written agreement of the entity and the claimant made before the 45-day period has expired. Govt C §911.6(a). An application, like a claim (see Govt C §912.4), is deemed to have been denied (or rejected) if the entity has not acted on it by the 45th day, or by the last day of the period specified in such an agreement. Govt C §911.6(c).

See Govt Tort Liability §§7.1-7.2, 7.32-7.39.

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§8.49 3. If Application to File Late Claim Denied

If the application to file a late claim is denied, a petition for relief may be filed within 6 months in a court in which the action could properly be tried. Govt C §946.6. The petition must be served on the entity, along with notice of the time and place of hearing, in the same manner as service of a summons. *Thierfeldt v Marin Hosp. Dist.* (1973) 35 CA3d 186, 110 CR 791. If the petition is granted, the complaint should be filed in the same court. *Church v County of Humboldt* (1967) 248 CA2d 855, 857, 57 CR 79, 81 (order granting petition not appealable).

Applying within 1 year for permission to file a late claim does not necessarily compel relief. The application to the public entity must also be made within a reasonable time. Govt C §§911.4(b), 946.6(c). See *Hasty v County of Los Angeles* (1976) 61 CA3d 623, 131 CR 347 (counsel's unexplained 60-day delay justified denial of application to file late claim).

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§8.50 4. Application Granted on Showing of Mistake, Inadvertence, Surprise, or Excusable Neglect

A late claim application must be granted on the ground of mistake, inadvertence, surprise, or excusable neglect unless the public entity establishes prejudice from the delay. Govt C §§911.6(b)(1), 946.6(c)(1). The misconception must be both

- reasonable (*Dockter v City of Santa Ana* (1968) 261 CA2d 69, 75, 67 CR 686, 691, disapproved on other grounds at 225 CA3d 1605); and
- shared by both claimant and counsel, if any (*Shaddox v Melcher* (1969) 270 CA2d 598, 601, 76 CR 80, 83 (attorney error was insufficient if claimant knew that public entity was involved)).

See *Renteria v Juvenile Justice, Dep't of Corrections & Rehabilitation* (2006) 135 CA4th 903, 37 CR3d 777 (attorney's mistaken reliance on office calendaring system, and secretary's assumption that entity had received claim, were excusable mistakes; no prejudice to entity when late claim was filed 9 days after 6-month limit). But see *Department of Water & Power v Superior Court* (2000) 82 CA4th 1288, 99 CR2d 173 (plaintiff and counsel who did no investigation into DWP's potential liability for water on road failed to act with due diligence; missing claim deadline was not excusable); *Spencer v Merced County Office of Educ.* (1997) 59 CA4th 1429, 69 CR2d 750 (filing claim with *county* after being told that *Office* was separate entity, and failing to consult Roster of Public Agencies was unreasonable and inexcusable; late claim relief denied even though entity not prejudiced by delay). See, however, *Bettencourt v Los Rios Community College Dist.* (1986) 42 C3d 270, 276, 228 CR 190 (attorney's assumption that city college was part of statewide education system was reasonable).

The showing required for late claim relief under Govt C §946.6 for mistake, inadvertence, surprise, or excusable neglect is the same as the showing required under CCP §473 for relief from a default judgment. *Kaslavage v West Kern County Water Dist.* (1978) 84 CA3d 529, 535, 148 CR 729, 732 (inadequate questioning failed to disclose defendant's ownership of instrumentality). See also *Hasty v County of Los Angeles* (1976) 61 CA3d 623, 627, 131 CR 347,349 (entity has no burden to show prejudice until petitioner shows acceptable reason for failure to present timely claim).

Once it is shown that an application for leave to file a late government tort claim was made within a reasonable time and that the failure to present a claim was through mistake, inadvertence, surprise, or excusable neglect, the burden shifts to the public entity to establish by a preponderance of the evidence that it would be prejudiced if the court relieves the petitioner from the statutory requirement. See *Ramarez v County of Merced* (1987) 194 CA3d 684, 239 CR 774 (trial court abused discretion in denying plaintiff's petition for relief when no substantial evidence supported finding that defendants suffered prejudice).

See Govt Tort Liability §§7.8-7.18.

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§8.51 5. Effect of Minority

A public entity must grant a late claim application if the claimant was a minor throughout the claim period. Govt C §§911.6(b)(2), 946.6(c)(2). A minor's late claim application must be accepted if filed within 1 year after the date that the parent or guardian knew or should have known that the child's injuries were caused by the defendant's negligence. The lack of diligence by the minor's parents or attorney cannot be attributed to the minor. See *Hernandez v County of Los Angeles* (1986) 42 C3d 1020, 232 CR 519.

Further, even the appointment of independent counsel by a juvenile court to act on a minor's behalf by pursuing potential court claims does not free a public entity defendant from the obligation to grant a late claim application. *County of Los Angeles v Superior Court* (Crystal B.) (2001) 91 CA4th 1303, 111 CR2d 471 (independent counsel was not equivalent of parent or guardian ad litem; tort claim filed within 1 year of termination of minor's dependency status).

Even if a minor's late claim application is filed more than 1 year after accrual of the cause of action, there are circumstances in which the entity will be held to be estopped from asserting the minor's noncompliance. See *John R. v Oakland Unified Sch. Dist.* (1989) 48 C3d 438, 445, 256 CR 766 (teacher's threat to retaliate against molested child if child reported incident estopped district from "tolled" time within which claim could be filled); *Doe v Bakersfield City Sch. Dist*. (2006) 136 CA4th 556, 39 CR3d 79 (22-year-old, deterred from filing claim by threats from junior high school counselor who molested him, acted within reasonable time after deterrent effect of threats ceased); *Ortega v Pajaro Valley Unified Sch. Dist.* (1998) 64 CA4th 1023, 75 CR2d 777 (district estopped by complicity in concealing teacher's prior misconduct); *Christopher P. v Mojave Unified Sch. Dist.* (1993) 19 CA4th 165, 23 CR2d 353 (same as *John R.*).

See Govt Tort Liability §§7.26-7.27.

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§8.52 6. Effect of Physical or Mental Disability

Physical or mental incapacity during the entire claims period is a ground for granting a late claim application if the incapacity was a cause of the noncompliance. Govt C §§911.6(b)(3), 946.6(b)(3). See *Martin v County of Madera* (1968) 265 CA2d 76, 80, 70 CR 908, 911 (evidence authorized finding against incapacity); *Pope v County of Riverside* (1963) 219 CA2d 649, 651, 33 CR 491, 493 (same). In *Draper v City of Los Angeles* (1990) 52 C3d 502, 276 CR 864, the supreme court permitted a plaintiff to obtain relief from failure to file a timely claim against a city and other governmental units when the plaintiff had been physically and mentally incapacitated during the claim-filing period, even though an attorney, apparently on the plaintiff's behalf, had filed a timely claim against a school district during the period of incapacity.

The time during which a claimant was mentally incapacitated, and did not have a guardian or conservator of his or her person, is not counted in computing the 1-year period after the accrual of his cause of action within which a late claim application must be filed, nor is the time, under specified circumstances, during which the person is detained or adjudged to be a dependent child of the juvenile court. Govt C §911.4(c). Further, the time during which late claim relief may be sought is tolled even if the incapacitated person had a conservator if the conservator did not, and could not, have known of the claim. *Favorite v County of Los Angeles* (1998) 68 CA4th 835, 80 CR2d 656.

An injured minor who has parents capable of acting on his or her behalf may not invoke §911.4(c) tolling provisions even if the minor is mentally incapacitated. *Hernandez v County of Los Angeles* (1986) 42 C3d 1020, 1025, 232 CR 519.

See Govt Tort Liability §§7.26, 7.28.

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§8.53 7. Death of Injured Person

The death of the injured person before expiration of the claims period is a further ground for granting a late claim application. Govt C §§911.6(b)(4), 946.6(c)(4). The decedent's heirs must file their own claims for wrongful death within 6 months after the date of death. See *Lewis v City & County of San Francisco* (1971) 21 CA3d 339, 98 CR 407.

See Govt Tort Liability §§7.26, 7.29.

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§8.54 H. When Insurer Involved

An insurer who is the subrogee of the insured is not required to file a separate claim within the time limits of Govt C §911.2 if the insured has already filed a timely claim on his or her own behalf or has otherwise complied with claim-filing requirements (*e.g.,* by filing a cross-complaint against a public entity who is already a party to the action). *Smith v Park Manor* (1987) 197 CA3d 872, 243 CR 256.

If an insurer or other person makes an advance or partial payment for an injury, but fails to notify the recipient in writing of applicable claim-filing requirements, the running of the time within which a claim against a public entity must be filed is tolled from the day of the first payment until notice is actually given. Ins C §11583. See *Maisel v San Francisco State Univ.* (1982) 134 CA3d 689, 184 CR 694 (question whether medical services furnished were "advance payments").

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V. ACTIONS AGAINST PUBLIC ENTITIES AND EMPLOYEES

A. Must Present Claim Before Filing Suit

§8.55 1. Action Against Public Entity

No suit for money or damages may be brought against a public entity unless, subject to estoppel and late claim relief, a claim has been presented in compliance with Govt C §§900-915.2 and rejected by the entity. Govt C §945.4; *State v Superior Court (Bodde)* (2004) 32 C4th 1234, 13 CR3d 534 (noncompliance may be raised by demurrer to complaint); *Ridley v City & County of San Francisco* (1969) 272 CA2d 290, 292, 77 CR 199, 200 (claims statute applies to minors); *Petersen v City of Vallejo* (1968) 259 CA2d 757, 768, 66 CR 776, 784 (premature filing of action before claim rejected is matter of abatement); *Tietz v Los Angeles Unified Sch. Dist.* (1965) 238 CA2d 905, 911, 48 CR 245, 249 (complaint must plead compliance).

The claims requirements apply generally to all tort, contract, and inverse condemnation causes of action against any public entity (Govt C §§900.4, 905), including the state (Govt C §§900.6, 905.2), except for the University of California (Govt C §905.6). See *TrafficSchoolOnline, Inc. v Clarke* (2003) 112 CA4th 736, 5 CR3d 408 (claim for monetary relief, although "incidental" to claim for injunctive relief, barred by failure to meet claim filing requirement); *Hom v Chico Unified Sch. Dist.* (1967) 254 CA2d 335, 338, 61 CR 920, 921 (minor's personal injury action). See §8.38 on causes of action to which claims requirements apply.

See Govt Tort Liability §§5.5-5.18.

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§8.56 2. Action Against Public Employee

Generally, the claims procedure and the statute of limitations applicable to bringing actions against public employees are the same as in actions against public entities. See generally Govt C §§950-950.6. Prior rejection by the employing public entity of a written claim is a normal condition precedent to suit against the employee, if the alleged tort occurred in the scope of the defendant's employment. Govt C §§950.2, 950.6(a). See *Fowler v Howell* (1996) 42 CA4th 1746, 1751, 50 CR2d 484 (claim necessary for malicious prosecution action against co-employee acting in course of employment, complaining of sexual harassment by plaintiff).

Suit against a public employee is not barred by Govt C §950.2 for failure to present a timely claim to the employing entity if the employee was not acting within the scope of employment in committing the tortious acts. *Bahan v Kurland* (1979) 98 CA3d 808, 159 CR 661.

See Govt Tort Liability §§8.37-8.38.

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Source: Torts/California Tort Guide/8 Governmental Liability/§8.57 B. Time Limitations

§8.57 B. Time Limitations

An action against a public entity must ordinarily be brought within 6 months after delivery or mailing of written notice that the claim has been rejected, or within 2 years after accrual of the cause of action if no written notice was given. Govt C §945.6. Govt C §945.6(a)(1). See Govt C §§946.4, 946.6 for exceptions to this time limit. The need to file a complaint within 6 months of the denial of a claim is not excused by the previous filing of a petition to perpetuate testimony under CCP §2035.010. *Orr v City of Stockton* (2007) 150 CA4th 622, 58 CR3d 662. See *Paniagua v Orange County Fire Auth.* (2007) 149 CA4th 83, 88, 56 CR3d 746 (rejecting application for late claim is not equivalent to rejecting claim, but plaintiff's lack of judicially appointed personal representative does not toll running of 2-years-from-accrual limitations period).

The 6-month limitations period may, in certain circumstances, be extended by the equitable tolling doctrine. See *Addison v State* (1978) 21 C3d 313, 146 CR 224 (plaintiffs who filed federal court action within 6 months after rejection of claim were permitted to file state court action 8 months after rejection); *Sofranek v County of Merced* (2007) 146 CA4th 1238, 53 CR3d 426 (plaintiff filed two claims based on same facts; although time to sue would have been within 6 months after first claim was rejected, entity's response to second claim gave plaintiff 6 months from its rejection); *Harris v Grimes* (2002) 104 CA4th 180, 183, 127 CR2d 791 (for purposes of malpractice suit alleging that attorney failed to respond to order to show cause, plaintiff's state law negligence claim deemed suspended until federal civil rights claim based on same event concluded). See also *Okoro v City of Oakland* (2006) 142 CA4th 306, 48 CR3d 260 (continued pendency of federal lawsuit and filing against fictitious names may toll time limits or stop their running). But see *Bonifeld v County of Nevada* (2001) 94 CA4th 298, 304, 114 CR2d 207 (no equitable tolling if plaintiff, who had 107 days to file state suit after dismissing federal suit, did not act reasonably in waiting until 146th day).

The 6-month limitation applies, however, to bar a minor's medical malpractice lawsuit filed more than 6 months after the claim was rejected even though a previous, substantially identical suit had been filed within 6 months, then voluntarily dismissed (presumably to permit the minor's damages to be more fully ascertained), and the second suit would not have been barred by the medical malpractice statute of limitations. *Martell v Antelope Valley Hosp. Med. Ctr.* (1998) 67 CA4th 978, 79 CR2d 329.

The requirement that suit be filed within 6 months of rejection of a timely claim is not negated by CCP §340.1, which gives extended cause of action accrual status to claims and suits for actions based on the sexual abuse of a minor. *County of Los Angeles v Superior Court (N.L.)* (2005) 127 CA4th 1263, 26 CR3d 445 (timely claim presented by claimant's mother after claimant had left the county and turned 18; claimant filed suit 1.5 years after claim presented by mother had been rejected). See note in §8.39.

A notice of rejection of a claim is deemed to have been given on the date the written notice was deposited in the mail (or personally delivered), and the 6-month period to file an action begins to run on that date. *Him v City & County of San Francisco* (2005) 133 CA4th 437, 34 CR3d 838 (plaintiffs' assertion that rejection form was never received does not overcome entity's proof of service by mail; 45 days after plaintiffs served notice of claim, they should have assumed it had been rejected); *Edgington v County of San Diego* (1981) 118 CA3d 39, 173 CR 225 (action filed 6 months after date certified letter was received, 1 day after it was mailed, was barred). See also *Jenkins v County of Contra Costa* (1985) 167 CA3d 152, 213 CR 126 (written notice of denial of application to file late claim constitutes written rejection of claim itself).

Compliance with the filing requirements of the Government Code may absolve the plaintiff from the need to file suit within the limitations period specified in the Code of Civil Procedure. *Schmidt v Southern Cal. Rapid Transit Dist.* (1993) 14 CA4th 23, 17 CR2d 340 (noting that plaintiff had 6 months to file claim, entity another 45 days to deny it, and plaintiff another 6 months to file suit, totaling more than 1 year after cause of action accrued). If claims statutes have not been complied with, statutes of limitations applicable to causes of action for injury or death may provide an alternative defense. See *Kendrick v City of Eureka* (2000) 82 CA4th 364, 98 CR2d 153 (after 1 year from date of injury, plaintiffs had 30 days after final decision in federal court to file action based on state law claims; no tolling while writ of certiorari pursued; state governmental claims statutes not mentioned). But see *Roberts v County of Los Angeles* (2009) 175 CA4th 474, 96 CR3d 60 (3-year period under CCP §340.5 prevails in suit against health care provider; see §9.73).

A public entity may assert a statute of repose defense when neither a claim was presented to it nor suit filed within an applicable statutory period. See, *e.g., Gaggero v County of San Diego* (2004) 124 CA4th 609, 21 CR3d 388 (claim for damages from subsidence of landfill not presented, nor suit filed, within 10 years of entity's sale of property; see §6.18 on 10-year period specified by CCP §337.15 for latent deficiencies in improvement to real property).

See §8.39; Govt Tort Liability §§8.1-8.14.

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1. If Application for Late Claim Relief

§8.58 a. When Application Granted

A claimant who is granted late claim relief must file suit in the court that ordered the relief, within 30 days after the order was made. Govt C §946.6(f); *Todd v County of Los Angeles* (1977) 74 CA3d 661, 141 CR 622 (plaintiff's minority did not excuse failure to file within 30 days, nor was attorney's neglect excusable). The suit may be filed within the 30-day period even after the usual Code of Civil Procedure limitations period has run. *Brown v Huntington Beach Union High Sch. Dist.* (1971) 15 CA3d 640, 642, 93 CR 417 (action filed 9 days after 1-year statute had run).

The 30-day period for commencing an action after a court has granted a petition for late claim relief begins to run when the order is made, not when the clerk's notification of the ruling is mailed or received. *Fritts v County of Kern* (1982) 135 CA3d 303, 185 CR 212. If a court permits a plaintiff to file an action against a public entity, even if the plaintiff has not complied with claim-filing requirements, suit must be filed within 30 days after entry of the minute order. Govt C §946.6(f); *McHale v State* (1981) 125 CA3d 396, 178 CR 83 (plaintiff's later filing of formal written order does not extend time). See discussion of 30-day period in *Mandjik v Eden Township Hosp. Dist.* (1992) 4 CA4th 1488, 1498, 6 CR2d 582.

Filing an application for late claim relief does not toll the statute of limitations on the filing of a lawsuit if filing a claim is not a prerequisite to filing the lawsuit. See *Banfield v Sierra View Local Dist. Hosp.* (1981) 124 CA3d 444, 455, 177 CR 290, 296, disapproved on other grounds at 53 C3d 328 n4 (filing claim not required, because public entity had failed to file updated information in Roster of Public Agencies; see §8.22).

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§8.59 b. Petition to Sue After Late Claim Denied

The petition to a court under Govt C §946.6, made after an entity has denied an application for leave to file a late claim, asks the court to relieve the claimant from the need to have presented a claim before suing (*i.e.,* for relief from Govt C §945.4), not for permission to file a late claim. Thus, if the petition is granted, the claimant has 30 days to file a complaint even though the order may purport to authorize the petitioner to file a claim. *Tuolumne Air Serv. v Turlock Irrig. Dist.* (1978) 87 CA3d 248, 251, 150 CR 809, 810 (court had no power to order that petitioner be permitted to file late claim, only power to allow timely filing of complaint). See *Harris v Grimes* (2002) 104 CA4th 180, 190, 127 CR2d 791 (statute of limitations tolled for 30 days after dismissal of federal civil rights claim; see §8.57).

The petition to the court must be made within 6 months after the entity served notice rejecting late claim relief. *City of Los Angeles v Superior Court* (1993) 14 CA4th 621, 17 CR2d 703 (entity entitled to summary judgment when no evidence contradicted entity employee's declaration that notice was mailed on stated date, more than 6 months before petition was filed with court). See *Lineaweaver v Southern Cal. Rapid Transit Dist.* (1983) 139 CA3d 738, 189 CR 29 (Govt C §946.6 6-month restriction on petitioning for relief from denial of late claim application is a statute of limitations).

See Govt Tort Liability §§7.40-7.65, 8.12.

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§8.60 2. If Criminal Charge Pending

A person charged with a criminal offense cannot bring a civil damages action against an officer or the officer's public entity employer while the charge is pending before a California court. Govt C §945.3. See *Blunt v County of Sacramento* (ED Cal 2006) 2006 US Dist Lexis 11099 (claims against state entities filed within 6 months; time to file federal suit asserting state law causes of action tolled while criminal charges pending). The statute of limitations on filing an action, but not on filing a claim, is tolled while the criminal charge is pending, although "pending" does not include appeals and diversion proceedings. Govt C §945.3. However, a person who files a lawsuit against "civilian" defendants, even if it is based on the conduct of peace officers, must serve process on those defendants within 3 years after filing the complaint. See *Damjanovic v Ambrose* (1992) 3 CA4th 503, 510, 4 CR2d 560, 564 (purpose of Govt C §945.3 is to prevent criminal defendants from using civil lawsuits to gain plea bargaining leverage; it does not toll statutes of limitation on actions against persons other than public officers and their employers).

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§8.61 C. Award of Defense Costs for Action Not Brought or Maintained in Good Faith or With Reasonable Cause

A public entity that has been dismissed from a suit by summary judgment or nonsuit, may obtain an award of "defense costs" on a finding that the proceeding was not brought or maintained either (1) in the good faith belief that there was a justifiable controversy under the facts and the law or (2) with reasonable cause. CCP §1038(a). *Kobzoff v Los Angeles County Harbor/UCLA Med. Ctr.* (1998) 19 C4th 851, 80 CR2d 803. See *Gamble v Los Angeles Dep't of Water & Power* (2002) 97 CA4th 253, 118 CR2d 271 (timeliness of motion for costs); *Hall v Regents of Univ. of Calif.* (1996) 43 CA4th 1580, 51 CR2d 387 (declining to dismiss entity to avoid "empty chair" at trial against other defendant did not constitute reasonable cause); *Carroll v State* (1990) 217 CA3d 134, 265 CR 753 (state's summary judgment motion granted because nothing in record showed that plaintiffs brought suit in good faith or with reasonable cause; plaintiffs simply named every conceivable defendant); *Curtis v County of Los Angeles* (1985) 172 CA3d 1243, 218 CR 772 (statute provides entities protective remedy against unmeritorious litigation).

"Defense costs" include "reasonable attorney's fees, expert witness fees, the expense of services of experts, advisers, and consultants in defense of the proceeding, and where reasonably and necessarily incurred in defending the proceeding." CCP §1038(b).

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§8.62 D. Damages Assessed Against Employee

A public entity is required by Govt C §§825 and 825.2 to pay damages awarded against a public employee only if the entity actually conducted the employee's defense without a reservation of rights, or if the employee establishes that the conduct on which claim or judgment was based was within the scope of the employment. See *Rivas v City of Kerman* (1992) 10 CA4th 1110, 13 CR2d 147. Whether the employee was acting outside the scope of his employment is a question of fact that cannot be decided as a matter of law on a demurrer. See *Johnson v County of Fresno* (2003) 111 CA4th 1087, 1097, 4 CR3d 475 (county employee sued for sexual harassment entered into stipulated judgment assigning his Govt C §825.2 indemnity claim against the county to the plaintiff; plaintiff's dismissal of county from original suit did not preclude pursuit of assigned claim). Government Code §995.2 lists grounds on which an entity may refuse to provide for the defense of a civil action or proceeding against an employee or former employee. See also Govt C §995.9 (defense or indemnification not provided if testimony giving rise to action against witness was false in any material respect).

See §8.8 on entity's obligation to provide defense for employee.

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Source: Torts/California Tort Guide/8 Governmental Liability/§8.63 E. Punitive Damages

§8.63 E. Punitive Damages

A public entity is not liable for punitive damages. Govt C §818. See *McAllister v South Coast Air Quality Mgmt. Dist.* (1986) 183 CA3d 653, 228 CR 351 (§818 upheld as constitutional).

The immunity provided by Govt C §818 does not extend to individual employees. Thus, a public employee, just as a private person, can be liable for punitive damages. *Runyon v Superior Court* (1986) 187 CA3d 878, 232 CR 101 (allegation against individual public employees for punitive damages due to wrongful employment practices and violation of civil rights improperly stricken from complaint). Further, Govt C §818 does not immunize a public entity from liability for the $25,000 penalty provided by CC §52(b)(2) for violations of CC §51.7 (a part of the Unruh Civil Rights Act). *Los Angeles County Metro. Transp. Auth. v Superior Court (Lyons)* (2004) 123 CA4th 261, 20 CR3d 92 (bus driver insulted and assaulted passenger).

However, a public entity may pay a punitive damages award if the legislature approves it, and "upon recommendation of the appointing power of the employee or former employee" if (1) the employee was acting in the course and scope of his or her employment, (2) the employee acted in good faith, without actual malice, and in the apparent best interests of the public entity, and (3) payment of the claim or judgment would be in the best interests of the public entity. Govt C §825(b).

NOTE: Government Code §825(e) neither (1) affects the prohibition against public entity punitive damages liability in Govt C §818 nor (2) operates as a waiver of the entity's immunity from liability for punitive damages under federal civil rights statutes. An entity's discretionary decision, under Govt C §825(b), to pay punitive damages awarded against its employee in a civil rights action does not conflict with federal law. *Trevino v Gates* (9th Cir 1996) 99 F3d 911, aff'd without published opinion at 145 F3d 1341; *Cornwell v City of Riverside* (9th Cir 1990) 896 F2d 398. Allegations that an entity's governing body exercised in bad faith its discretionary power to indemnify police officers accused of violating the plaintiff's civil rights state a cause of action for violation of 42 USC §1983. See *Navarro v Block* (9th Cir 2001) 250 F3d 729; *Blumberg v Gates* (CD Cal 2001) 144 F Supp 2d 1221, 1224. But see *Hernandez v Gates* (CD Cal 2000) 100 F Supp 2d 1209 (absent bad faith, city council members immune from liability based on policy of indemnifying police officers for punitive damages awards against them).

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), citing *City of Sanger v Superior Court* (1992) 8 CA4th 444, 10 CR2d 436.

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§8.64 F. Available Defenses

A public entity is entitled to assert any defenses that would be available to it if it were a private person (Govt C §815(b)), including contributory negligence, assumption of risk, and third party negligence. *Chase v Shasta Lake Union Sch. Dist.* (1968) 259 CA2d 612, 615, 66 CR 517, 519). See *Newson v City of Oakland* (1974) 37 CA3d 1050, 112 CR 890 (entity that built traffic island in center of street was entitled to instruction on contributory negligence when motorcyclist/plaintiff could not explain failure to see barriers and flashing lights around traffic island).

NOTE: A plaintiff who seeks to recover damages from a public entity must sometimes first exhaust an administrative remedy, even one that does provide for the recovery of damages. See *Wright v State* (2004) 122 CA4th 659, 19 CR3d 92 (state prison inmate, alleging injury from medical malpractice and failure to furnish medical care).

The burden of proving contributory negligence is on the defendant entity even in actions based on a dangerous condition of public property, in which the danger is related to using the property with due care. See Govt C §830(a); *Kechter v City of Downey* (1968) 265 CA2d 877, 881, 71 CR 844, 846; *Callahan v City & County of San Francisco* (1967) 249 CA2d 696, 702, 57 CR 639, 644. Violation of an ordinance restricting the use of public property can create a presumption of contributory negligence. See Evid C §669 (discussed in §§1.31-1.34); *Ferrell v City of Santa Monica* (1972) 26 CA3d 374, 102 CR 705 (plaintiff on beach before 5 a.m., in violation of ordinance, was injured by beach-cleaning machine).

See §§8.26-8.29; Govt Tort Liability §§1.27-1.28, 12.56-12.101 (defenses and immunities available to a public entity), 12.102-12.120 (defenses and immunities available to a public employee).

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G. Cross-Claims

§8.65 1. Claim Filing Requirements

A cross-complaint against the state by defendants in a personal injury action is subject to claim filing requirements even if it is identified in its prayer as an action for declaratory relief. *State v Superior Court (Shortstop)* (1983) 143 CA3d 754, 757, 192 CR 198, 199 (deciding applicability of statutory amendment stating that cause of action for indemnity accrues on date defendant is served with compliant giving rise to indemnity claim).

There are some circumstances in which the claims requirements of the Tort Claims Act do not apply to defensive cross-complaints. The court in *Krainock v Superior Court* (1990) 216 CA3d 1473, 1478, 265 CR 715, adopted Van Alstyne's rules for determining the applicability of claims requirements to defensive cross-complaints, which are as follows:

- First, the situations in which claims requirements should not apply should be limited to cases initiated by the public entity. (The action may be one in which the public entity is a defendant, but where the defendant seeks indemnity against persons who were not originally a party to the suit.)
- Second, to be exempt from claims requirements, the defensive pleading must not introduce an unrelated claim and must arise from the same transaction or event forming the basis of the plaintiff's claim.
- Third, the cross-complaint can assert only defensive matters. Thus, the cross-complaint may not include claims for affirmative relief but only claims that, if successful, would destroy or diminish plaintiff's recovery.

These rules satisfy the claims statutes' policy that the public entity investigate the relevant facts of the incident giving rise to a claim before an action is filed. *Krainock v Superior Court* (1990) 216 CA3d 1473, 1477, 265 CR 715.

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§8.66 2. Comparative Indemnity; Proposition 51

A defendant or a cross-defendant who has been sued for damages may cross-complain for comparative (*i.e.,* partial or equitable) indemnity against a cotortfeasor that is a public entity or employer, but the cross-complainant must have complied with claim presentation requirements. See *People ex rel Dep't of Transp. v Superior Court* (*Frost)* (1980) 26 C3d 744, 163 CR 585; *Wagner v State* (1978) 86 CA3d 922, 926, 150 CR 489, 491. See §§1.62-1.68 on comparative indemnity and §§8.38-8.54 on claims presentation requirements.

The original plaintiff's failure to have named the entity as a defendant or to have presented a claim to the entity does not prevent the cross-complainant from doing so. *People ex rel Dep't of Transp. v Superior Court (Frost), supra*. However, contrary to the *Frost* holding, defendant's indemnity cause of action is deemed to accrue on the date the tortfeasor is served with the complaint (or cross-complaint) that gives rise to the indemnity claim (rather than on the date cross-complainant paid more than his share of the original plaintiff's damages). Govt C §901.

NOTE: A defendant should file a claim for equitable indemnity as soon as possible if there is any possibility that other tortfeasors are governmental entities requiring application of governmental claims procedures.

A defendant who has cross-complained against a public entity and is then found not to be liable for the plaintiff's injury (*i.e.,* is assigned a zero fault percentage) cannot recover costs of defense or an attorney fee from the entity that was found at fault. See *Watson v Department of Transp.* (1998) 68 CA4th 885, 892, 80 CR2d 594.

The appellate court that vacates the assignment of a fault percentage to a public entity may, under CC §1431.2 (Proposition 51), reassign all fault to a public employee and the injured person, using the ratio of the fault percentages assigned to those parties by the trier of fact. See *Munoz v City of Union City* (2007) 148 CA4th 173, 55 CR3d 393 (city immune from direct liability to survivors of person killed by police officer; original assignment of 5 percent to decedent, 50 percent to officer, and 45 percent to city, modified to assign 9 percent to decedent and 91 percent to officer; see §8.13 on liability in this case). See also *Munoz v City of Union City* (2009) 173 CA4th 199, 92 CR3d 527 (postjudgment interest award in preceding case).

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Medical Malpractice

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I. MEDICAL DOCTORS (PHYSICIANS AND SURGEONS)

A. Grounds for Professional Liability

1. Negligence in Diagnosis or Treatment

§9.1 a. Duty to Possess and Use Professional Knowledge, Skill, and Care

A medical doctor is liable for injuries to a patient caused by failure to possess and exercise, in either diagnosis or treatment, that reasonable degree of skill, knowledge, and care that is ordinarily possessed and used by other medical doctors in similar circumstances. *Landeros v Flood* (1976) 17 C3d 399, 408, 131 CR 69 (question of fact whether doctor should have diagnosed battered-child syndrome and "treated" it by reporting injuries to authorities as required by statute); *Bardessono v Michels* (1970) 3 C3d 780, 788, 91 CR 760. See *Alef v Alta Bates Hosp.* (1992) 5 CA4th 208, 215, 6 CR2d 900 (standard stated). In other words, a doctor must (1) have the required degree of learning and skill and (2) use ordinary care and diligence in applying that learning and skill. *McCurdy v Hatfield* (1947) 30 C2d 492, 495, 183 P2d 269 (treatment); *Lawless v Calaway* (1944) 24 C2d 81, 86, 147 P2d 604 (diagnosis). Thus, the plaintiff must establish (1) the defendant's duty to use such skill, prudence, and diligence as other members of the profession possess and use, (2) conduct that breached that duty, (3) a proximate causal connection between defendant's negligent or wrongful conduct and the resulting injury, and (4) actual loss or damage. *Budd v Nixon* (1971) 6 C3d 195, 200, 98 CR 849; *Elcome v Chin* (2003) 110 CA4th 310, 317, 1 CR3d 631; *Hanson v Grode* (1999) 76 CA4th 601, 606, 90 CR2d 396.

A doctor who is not a specialist is held to a standard of average or ordinary medical skill, knowledge, and care, rather than the highest skill possible. *Sinz v Owens* (1949) 33 C2d 749, 753, 205 P2d 3; *Allen v Leonard* (1969) 270 CA2d 209, 215, 75 CR 840.

A doctor can sometimes meet the required standard by ensuring the availability of other doctors who have the skills that may be needed. See *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 163, 41 CR 577 (fact question whether standard required eye surgeon to be able to operate for cardiac arrest or to provide that chest surgeon be present).

The locality in which the doctor practices is a factor that may be considered in determining similarity of conditions, but a doctor's conduct is not judged only by the standard of medical practice in the locality. See *Sinz v Owens* (1949) 33 C2d 749, 756, 205 P2d 3; *Gist v French* (1955) 136 CA2d 247, 269, 288 P2d 1003, disapproved on other grounds at 54 C2d 478. See also *Rainer v Community Mem. Hosp.* (1971) 18 CA3d 240, 259, 95 CR 901 (continued appropriateness of "locality factor"). See Anno, 36 ALR3d 440 (1971) (locality rule as applied to hospitals). See §9.36 on practice locale as witness qualification.

There are situations in which it can make a difference whether a health care provider's wrongful conduct is deemed to be "professional negligence," "ordinary negligence," or some other tort. See, *e.g.,* §§9.29, 9.71, 9.76.

On medical malpractice relating to particular procedures and injuries, see Annos, 51 ALR5th 301 (1997) (meningitis); 48 ALR5th 575 (1997) (male organs); 43 ALR5th 87 (1996) (diabetes); 33 ALR5th 619 (1995) (treatment of athletes by sports medicine providers); 31 ALR5th 1 (1995) (catheterization); 30 ALR5th 571 (1995) (ophthalmology), 28 ALR5th 497 (1995) (breast surgery), 19 ALR5th 563 (1994) (treatment of skin conditions and scars), 6 ALR5th 490 (1992) (during labor); 6 ALR5th 534 (1992) (postdelivery). See also Anno, 124 ALR5th 623 (2004) (propriety of "hindsight" charge).

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§9.2 (1) Standard for Medical Specialists

Medical specialists must possess and use the learning, care, and skill ordinarily possessed and exercised by practitioners of that specialty under similar circumstances. *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425, 438, 131 CR 14 (psychologist/therapist); *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 159, 41 CR 577, 580 (ophthalmologist/anesthesiologist). See also *Hubbard v Calvin* (1978) 83 CA3d 529, 532, 147 CR 905 (error to instruct that it was malpractice to use an arteriogram technique that "was not approved by a respectable minority of neurosurgeons").

A doctor who has had special training and experience in a particular field is subject to this higher standard, even if the doctor has not claimed to be a specialist. *Valentine v Kaiser Found. Hosps.* (1961) 194 CA2d 282, 294, 15 CR 26, 33, disapproved on other grounds at 57 C2d 839.

On the liability of a specialist who sends a nonspecialist to attend in his stead, see *Mercado v Leong* (1996) 43 CA4th 317, 50 CR2d 569 (obstetrical specialist may be liable for emotional distress experienced by mother because of injury to child during delivery; see §9.22).

See Anno, 18 ALR4th 603 (1982) (standard of care for medical specialist; locality rule).

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§9.3 (2) Statutory Duties

Particular statutes may, by imposing duties on doctors, establish a standard for diagnosis and treatment, violation of which gives rise to a presumption of negligence under Evid C §669 (see §1.32). See, *e.g., Landeros v Flood* (1976) 17 C3d 399, 413, 131 CR 69 (failure to report child abuse as required by Penal Code as cause of further injuries); *Galvez v Frields* (2001) 88 CA4th 1410, 1421, 107 CR2d 50 (plaintiffs entitled to negligence per se instruction on allegations that doctor, contrary to regulation, failed to advise mother about test that screens for neural tube defects); *Derrick v Ontario Community Hosp.* (1975) 47 CA3d 145, 120 CR 566 (failure to report contagious disease as required by Health and Safety Code). But see note in §8.9 on *Creason v Department of Health Servs.* (1998) 18 C4th 623, 76 CR2d 489 (state not liable under the newborn screening program in the Hereditary Disorders Act (Health & S C §§124975-124995)).

A doctor is not liable, however, for every injury that follows the breach of a statute or regulation. See *Traxler v Varady* (1993) 12 CA4th 1321, 16 CR2d 297 (plaintiff failed to establish that doctors' and others' supplying HIV-tainted blood (1) gave rise to a presumption of negligence for violation of California Code of Regulations, (2) violated right to informed consent (see §9.11), or (3) was battery (see §9.16)); *Lopez v Southern Cal. Permanente Med. Group* (1981) 115 CA3d 673, 679, 171 CR 527 (doctor and group that knew of epilepsy, but had not made initial diagnosis, not liable for failing to comply with statutory reporting requirement).

On liability under the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 USC §1395dd), see §§9.62, 9.86.

See Anno, 73 ALR4th 782 (1989) (statutory duty to report child abuse).

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§9.4 (3) Doctors' Respondeat Superior Liability

Under the respondeat superior principle, a doctor is liable for the medical negligence of an agent, an employee, or a partner. *Ales v Ryan* (1936) 8 C2d 82, 104, 64 P2d 409, 420 (physicians and nurses assisting in surgery are surgeon's temporary agents); *Gist v French* (1955) 136 CA2d 247, 265, 288 P2d 1003, 1014, disapproved on other grounds at 54 C2d 478. See *Valdez v Percy* (1950) 35 C2d 338, 342, 217 P2d 422, 425 (joint liability of assistant surgeon); *Ybarra v Spangard* (1944) 25 C2d 486, 492, 154 P2d 687, 690 (hospital employees as doctor's special employees); *Latson v Zeiler* (1967) 250 CA2d 301, 304, 58 CR 436, 438. See Annos, 12 ALR3d 1017 (1967) (surgeon's liability for negligence of nurse), 85 ALR2d 889 (1962). See §§4.45-4.57 on respondeat superior.

The lead surgeon performing an operation can be liable for the negligence of nurses and others assisting in the operation under the doctrines of respondeat superior, "captain of the ship," and nondelegable duty (*e.g.,* to ensure that all sponges and instruments have been removed before an incision is sutured). *Fields v Yusuf* (2006) 144 CA4th 1381, 1396, 51 CR3d 277 (patient entitled to instructions on res ipsa loquitur, nondelegable duty, and "captain of the ship"). *Fields* rejects the surgeon's reliance on *Truhitte v French Hosp.* (1982) 128 CA3d 332, 348, 180 CR 152 (fault allocated 45 percent to surgeon for failing to remove sponge and for breach of nondelegable duty to ensure that all foreign objects are removed before closing incision and 55 percent to hospital for nurses' negligent sponge count; fact question whether nurses who are hospital employees have become temporary agents or servants of operating surgeon; questioning validity of "captain of the ship" doctrine). 144 CA4th at 1397.

An attending doctor is not responsible for procedures or conduct of hospital physicians or nurses carried out independently and not under the doctor's control. *Seneris v Haas* (1955) 45 C2d 811, 828, 291 P2d 915, 925 (hospital anesthetist); *Rimmele v Northridge Hosp. Found.* (1975) 46 CA3d 123, 128, 120 CR 39 (doctor was not principal of nurse who gave injection); *Marvulli v Elshire* (1972) 27 CA3d 180, 103 CR 461 (operating surgeon not liable for conduct of anesthesiologist or nurse absent evidence of right to control); *Salgo v Leland Stanford Jr. Univ. Bd. of Trustees* (1957) 154 CA2d 560, 573, 317 P2d 170, 178 (aortography by hospital staff); *Sherman v Hartman* (1955) 137 CA2d 589, 596, 290 P2d 894, 898 (nurse giving blood transfusion). Nor is the attending physician liable for negligence of an independent consulting or substitute doctor called in or recommended by him. See Anno, 85 ALR2d 889, 897 (1967).

A surgeon performing an operation is not liable for the negligence of a prosthetic supplier's agent who negligently failed to have the correct device (a 32 millimeter acetabular cup) available when the surgeon called for it during an operation. See *Thomas v Intermedics Orthopedics, Inc*. (1996) 47 CA4th 957, 55 CR2d 197 ("captain of ship" instruction properly withdrawn; surgeon and supplier each assigned 50 percent of total fault).

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§9.5 (4) No Strict Liability; Mistakes; Natural Course of Disease

The strict product liability theory (see §11.1) does not apply to a doctor's services. *Finn v G.D. Searle & Co.* (1984) 35 C3d 691, 704, 200 CR 870 (instruction suggesting that doctor strictly liable for making incorrect diagnosis improper); *Barton v Owen* (1977) 71 CA3d 484, 498, 139 CR 494. See Anno, 100 ALR3d 1205 (1980) (applicability of strict liability rule to person rendering medical services). See §9.18 on warranty of results.

A mistake in diagnosis or treatment does not, by itself, show malpractice. *Fraijo v Hartland Hosp.* (1979) 99 CA3d 331, 343, 160 CR 246 (proper to instruct that physician can err in judgment or be unsuccessful in treatment without being negligent); *Stephenson v Kaiser Found. Hosps.* (1962) 203 CA2d 631, 636, 21 CR 646, 649. However, if the method of treatment was negligently chosen or carried out, it is not a defense that the doctor used his or her best judgment. *Sim v Weeks* (1935) 7 CA2d 28, 36, 45 P2d 350, 354. See *Maher v Saad* (2000) 82 CA4th 1317, 1327, 99 CR2d 213 (trial judge may decline to give BAJI 6.03—doctor who uses best judgment not negligent for choosing wrong one of several recognized methods of treatment—when method chosen by doctor may not have been appropriate for patient's particular condition). See CACI 506 (2003). See also *Ayala v Arroyo Vista Health Ctr.* (2008) 160 CA4th 1350, 73 CR3d 486 (harmless error to give CACI 506 instruction absent evidence that physician tested for hyperglycemia in light of evidence that failure to test did not breach standard of care).

A health care provider is not liable for professional negligence or malpractice for any occurrence or result that was caused by the natural course of the patient's disease or condition or that was the natural or expected result of reasonable treatment for the disease or condition. CC §1714.8. Further, in certain emergency situations, a doctor's failure to use ordinary professional skill and care may not be actionable. See §9.84 on "good Samaritan" laws. But see §9.11 on informed consent.

See Anno, 6 ALR6th 311 (2005) (appropriateness of "error in judgment" charge in medical malpractice cases).

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§9.6 b. Duty to Consult Specialist or Refer Patient

A general practitioner who knows, or in the exercise of reasonable care should know, that special consultation is required must consult a specialist or refer the patient to a specialist. Failure to do so constitutes malpractice unless the doctor conformed to the standard of a specialist. See *Sinz v Owens* (1949) 33 C2d 749, 758, 205 P2d 3, 8 (suggested jury instruction); *Wilson v Gilbert* (1972) 25 CA3d 607, 102 CR 31 (general surgeon performed femoral artery graft without prior arteriogram).

When a child's parent has chosen care by Christian Science practitioners and nurses, those persons have been held to have no duty to refer the child to medical doctors even if spiritual treatment seems inadequate or ineffective. See *Quigley v First Church of Christ, Scientist* (1998) 65 CA4th 1027, 76 CR2d 792.

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§9.7 c. Duty to Hospitalize

It is professional negligence for a doctor to fail to hospitalize a patient under circumstances in which standard practice dictates hospitalization. *Armstrong v Svoboda* (1966) 240 CA2d 472, 476, 49 CR 701, 704 (heart ailment); *Smith v Shankman* (1962) 208 CA2d 177, 186, 25 CR 195, 200 (ruptured tubal pregnancy).

Further, it can be negligence to send a patient to a hospital that is not equipped to deal with the patient's condition. See *Franz v Board of Med. Quality Assur.* (1982) 31 C3d 124, 141, 181 CR 732 (doctor could be disciplined for scheduling "high-risk" patient for surgery in hospital that had no intensive or cardiac care unit or respirator).

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§9.8 d. Duty to Attend Diligently; Abandonment

An unwarranted lack of diligence in attending a patient may constitute malpractice. *Lewis v Johnson* (1939) 12 C2d 558, 560, 86 P2d 99, 100 (insufficient postoperative attention); *Stephenson v Kaiser Found. Hosps.* (1962) 203 CA2d 631, 637, 21 CR 646, 650 (delay in reexamining); *Dickow v Cookinham* (1954) 123 CA2d 81, 85, 266 P2d 63, 65 (disregard of patient's complaints).

The individual doctor is not the sole judge of how frequent the patients' visits should be or of the need for them. The attention necessary depends on the customary practice of reputable physicians in similar circumstances. *Neudeck v Vestal* (1931) 117 CA 266, 268, 3 P2d 595, 596.

NOTE: A doctor may be liable for "neglect" as defined in Welf & I C §15610.57 of the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15766). See *Mack v Soung* (2000) 80 CA4th 966, 95 CR2d 830 (allegations that doctor ignored and then concealed patient's serious bedsore, opposed her hospitalization, and withdrew as her physician when she was in critical need of care). See §9.57 on the liability of a hospital or other custodial care facility under the EADACPA.

A doctor is liable for injury resulting from abandonment, neglect, or other failure to attend throughout the patient's illness or disability as long as medical attention is needed, unless the relationship was ended earlier by mutual consent, by dismissal of the doctor, or by the doctor's withdrawal after giving reasonable notice to the patient. See *Taylor v De Vaughn* (1928) 91 CA 318, 321, 266 P 960, 962 (postoperative care within surgeon's undertaking); *Hopkins v Heller* (1922) 59 CA 447, 452, 210 P 975, 977 (dictum). See also Anno, 57 ALR2d 432 (1958) (liability of physician who abandons case).

A doctor discharges the obligation not to abandon the patient by giving the patient adequate notice and opportunity to find alternative medical attendance. See *Payton v Weaver* (1982) 131 CA3d 38, 44, 182 CR 225 (kidney dialysis for disruptive patient); *Willard v Hagemeister* (1981) 121 CA3d 406, 414, 175 CR 365 (no abandonment when patient refused proffered treatment). Further, a doctor is not required to enter into a general employment, but may limit his or her undertaking to a particular service or to treatment at a particular time and place. *McNamara v Emmons* (1939) 36 CA2d 199, 204, 97 P2d 503, 507.

See Annos, 3 ALR5th 123, 146 (1992) (need to keep physician sufficiently informed of patient's status; attention and monitoring), 57 ALR2d 379, 388 (1958) (physician's duty to give continued care).

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§9.9 e. Duties in Prescribing and Administering Drugs and Devices

A doctor is liable for failing to use professional skill and care in prescribing or administering drugs and other forms of treatment. See *Duarte v Zachariah* (1994) 22 CA4th 1652, 1661, 28 CR2d 88 (overprescribing drug harmed patient's bone marrow and prevented completion of chemotherapy); *Kite v Campbell* (1983) 142 CA3d 793, 191 CR 363 (failure to give mumps inoculation to physically disabled infant who later became blind from mumps complications).

NOTE: Under Health & S C §120455, a doctor is not liable, absent willful misconduct or gross negligence, for consequences of administering an immunization required by state law. See *Salasguevara v Frye* (1995) 31 CA4th 330, 37 CR2d 40 (statutory immunity from liability for giving DPT shot to infant with evolving neurological disorder). See §9.54 on pharmacist's liability. See also 42 USC §§300aa-11-300aa-26 (National Vaccine Injury Compensation Program), under which compensation may be recovered for a vaccine-related injury or death and attorneys have an obligation to advise clients about such compensation.

Doctors' medical malpractice insurers may exclude from coverage liability for administering a drug that has not been approved by the United States Food & Drug Administration. See *Meza v Southern Cal. Physicians Ins. Exch.* (1998) 62 CA4th 709, 73 CR2d 91 (doctor injected tea tree oil into wart, leading to necrosis, infection, and partial amputation of finger).

A doctor who has prescribed or administered a drug or device, and who then learns that that item is dangerous, may be liable for injuries resulting from a failure to warn the patient of the danger. See *Tresemer v Barke* (1978) 86 CA3d 656, 671, 150 CR 384 (failure to warn patient of newly discovered hazards of previously inserted intrauterine device is "common negligence" rather than "malpractice"). See also *Fogo v Cutter Labs.* (1977) 68 CA3d 744, 754, 137 CR 417 (drug manufacturer discharges its duty to warn by informing doctors).

On the other hand, a doctor who prescribes a drug does not thereby become strictly liable as a product distributor for defects in the drug or for untoward side effects. *Carmichael v Reitz* (1971) 17 CA3d 958, 979, 95 CR 381. See also *Silverhart v Mount Zion Hosp.* (1971) 20 CA3d 1022, 98 CR 187 (hospital not liable for injuries caused by defective needle that broke during surgery).

A doctor who forces antipsychotic drugs on a prisoner or detainee absent medical appropriateness or overriding justification violates the prisoner's civil rights, but the doctor who does so pursuant to a court order is immune from liability. See *Kulas v Valdez* (9th Cir 1998) 159 F3d 453. See also *Johnson v Meltzer* (9th Cir 1998) 134 F3d 1393 (administering experimental drug to unconscious state prisoner violated his federal civil rights).

See Annos, 44 ALR6th 391 (2009) (physician liability for patient's addiction to, or overdose of, prescription drug), 65 ALR5th 357 (1999) (strict liability for harm caused by drug, medical instrument, or device), 47 ALR5th 433 (1997) (liability for side effects of prescribed or administered drug).

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Source: Torts/California Tort Guide/9 Medical Malpractice/§9.10 f. Duty to Prevent Patient From Harming Self or Others

§9.10 f. Duty to Prevent Patient From Harming Self or Others

A doctor can be liable for injury suffered by the patient or a nonpatient that follows the doctor's failure to inform a patient of a condition that poses a danger to the patient or others. See, *e.g., Reisner v Regents of Univ. of Cal.* (1995) 31 CA4th 1195, 1203, 37 CR2d 518 (doctor who did not tell 12-year-old patient or her parents that blood given her during surgery was HIV contaminated, or about how to prevent spread of AIDS, could be sued by nonpatient who later became HIV positive after intimate contact with patient); *Myers v Quesenberry* (1983) 144 CA3d 888, 892, 193 CR 733 (doctor who did not tell patient not to drive car liable to other motorists; special relationship (see §1.23) between doctors and patients imposed duty to warn patient that her condition and medication made driving dangerous to self and others; foreseeability that condition would cause her to lose control of car and injure others was fact question). A doctor can fulfill the duty to nonpatients by informing the patient of the risks to others and how to avoid harmful consequences. *Reisner v Regents of Univ. of Cal., supra.* See §9.11 on a doctor's liability for failing to inform a patient of possible harm from proposed treatment.

A doctor who determines (or in the exercise of professional skill and care should have determined) that a patient poses a serious danger of violence to others must use reasonable care to protect foreseeable victims from that danger. *Tarasoff v Regents of Univ. of Cal.* (1976) 17 C3d 425, 438, 131 CR 14 (psychiatrist's failure to warn victim). See *Jablonski v U.S.* (9th Cir 1983) 712 F2d 391 (duty of psychiatrist and hospital under Federal Tort Claims Act to restrain dangerous patient or to warn potential victims). See also *Sigman v U.S.* (9th Cir 2000) 208 F3d 760, amended at 217 F3d 785 (liability for negligently releasing serviceman who had been diagnosed as dangerous and who later shot 27 people at air force base). But see *Greenberg v Superior Court (Smith)* (2009) 172 CA4th 1339, 92 CR3d 96 (psychiatrist owed no duty to survivors of persons killed by patient to whom patient had exhibited no violent tendencies); *Tilley v Schulte* (1999) 70 CA4th 79, 82 CR2d 497 (police officer shot by psychiatric patient barred from recovering damages from psychiatrist by firefighter's rule (see §1.55)); *McDowell v County of Alameda* (1979) 88 CA3d 321, 324, 151 CR 779 (hospital owed no duty to person killed by mental patient who escaped). See also *Trear v Sills* (1999) 69 CA4th 1341, 82 CR2d 281 (psychotherapist not liable to adult patient's parent for allegedly convincing patient, based on "recovered memories," that parent had sexually abused her as a child and that suing parent would be therapeutic).

NOTE: Cases involving patients detained on a 72-hour hold under the Lanterman-Petris-Short Act (Welf & I C §§5150-5550) who are harmed, or who harm others, include: *Coburn v Sievert* (2005) 133 CA4th 1483, 35 CR3d 596 (Welf & I C §5154 immunized treating psychiatrist who authorized early release of patient who next day injured himself and his father); *Gonzalez v Paradise Valley Hosp.* (2003) 111 CA4th 735, 740, 3 CR3d 903 (patient escaped, cut self, and was shot by police; providers not immune); *Bragg v Valdez* (2003) 111 CA4th 421, 3 CR3d 804 (treating psychiatrist alleged to have released patient because patient lacked insurance; see §1.25); *Jacobs v Grossmont Hosp.* (2003) 108 CA4th 69, 77, 133 CR2d 9 (patient hurt in fall during confinement); *Cruze v National Psychiatric Servs., Inc.* (2003) 105 CA4th 48, 129 CR2d 65 (Welf & I C §5278 provides "good Samaritan" immunity (see §9.84) to hospitals as well as to individuals); *Heater v Southwood Psychiatric Ctr.* (1996) 42 CA4th 1068, 49 CR2d 880 (battery for administering tranquilizer without consent). See also *Cotterill v City & County of San Francisco* (ND Cal 2008) 2008 US Dist Lexis 63122 (claim for emotional distress and punitive damages for extending 72-hour hold without parent's consent as civil rights violation). The immunity provisions of Welf & I C §5154, discussed in *Ford v Norton, supra,* apply to a psychologist, as well as a psychiatrist, authorizing release.

A psychotherapist whose patient has "communicated a serious threat of physical violence against a reasonably identifiable victim or victims," and who fails to make reasonable efforts to communicate the threat to such a victim or to a law enforcement agency can be liable for the victim's injury or death. CC §43.92. See *Ewing v Northridge Hosp. Med. Ctr.* (2004) 120 CA4th 1289, 16 CR3d 591 (liability of hospital that employed psychotherapist: no need for expert testimony; jury could use common knowledge to find whether psychotherapist actually believed or predicted that patient

posed serious risk to identifiable victim; communication of threat could come from perpetrator's family member instead of perpetrator); *Ewing v Goldstein* (2004) 120 CA4th 807, 15 CR3d 864 (liability of psychotherapist who learned of threat from patient's family member). Absent a violation of the narrow provisions of CC §43.92, a medical practitioner or therapist is under no duty, particularly if it would require disclosure of a confidential communication, to warn others that a patient intended to harm himself or to damage property. *Calderon v Glick* (2005) 131 CA4th 224, 31 CR3d 707 (based on patient's denials and on his body language, therapist had no basis to predict patient would later shoot members of his ex-girlfriend's family before shooting himself); *Bellah v Greenson* (1978) 81 CA3d 614, 620, 146 CR 535 (psychiatrist not liable for failing to inform parents of daughter's suicidal propensity or that she let heroin addicts use their house).

Separate from the duty to warn third persons of a patient's violent or destructive nature is a doctor's duty to use reasonable care to prevent a patient's suicide or self-harm; those caring for and treating mentally disturbed patients must use reasonable care to prevent such patients from harming themselves if they know of facts from which they could reasonably conclude that the patient might do so absent preventative measures. *Kockelman v Segal* (1998) 61 CA4th 491, 505, 71 CR2d 552 (duty applies to psychiatrist treating outpatient). See *Meier v Ross Gen. Hosp.* (1968) 69 C2d 420, 424, 71 CR 903, 906; *Vistica v Presbyterian Hosp.* (1967) 67 C2d 465, 469, 62 CR 577, 579. See also *Klein v BIA Hotel Corp*. (1996) 41 CA4th 1133, 1140, 49 CR2d 60 (noted in §9.61); *Davis v Allen* (1994) 22 CA4th 354, 27 CR2d 429 (psychiatrist's duty to warn physician of risk of patient's suicide); *Katona v County of Los Angeles* (1985) 172 CA3d 53, 59, 218 CR 19 (hospital's duty).

See Annos, 81 ALR5th 167 (2000) (liability for failing to take steps to prevent patient's suicide), 28 ALR4th 712 (1984) (liability based on prior treatment of criminal's mental disorder), 8 ALR4th 464 (1981) (liability in treatment of mentally disordered patient).

On the right of a patient of sound mind not to submit to particular treatment and the right to require medical personnel to disconnect life-support machinery, see *Bartling v Superior Court* (1984) 163 CA3d 186, 209 CR 220 (physician who complies with such a request would not be civilly or criminally liable).

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g. Duty to Inform Patient

§9.11 (1) Risks of Treatment

A doctor is liable for a patient's injury that results from a course of treatment or procedure if (a) the doctor failed to make a reasonable disclosure to the patient (or to the legal guardian or closest available relative of a minor or incompetent patient) of the choices of available treatment and the potential dangers inherent in each and (b) a prudent person in the patient's position who had been adequately informed of all significant perils would not then have consented to the treatment. *Cobbs v Grant* (1972) 8 C3d 229, 239, 104 CR 505. That is, the duty to use professional care and skill includes a duty to disclose to the patient the information—including, in lay terms, possible complications and the potential for death or serious bodily harm from the procedure—that a skilled practitioner of good standing would provide under the circumstances to enable the patient to make an informed and intelligent choice on whether to undergo the treatment. 8 C3d at 244. This basis for medical negligence liability is distinct from battery for unauthorized treatment (see §9.16). See §9.10 on a doctor's liability for failing to inform a patient that the patient has a condition that poses a danger to the patient or to others.

The extent of disclosure required is measured by what the patient must know to make an informed decision, not solely by the practices of other doctors in the community. *Cobbs v Grant, supra*. The doctor must disclose to the patient all information "material" to the patient's decision, *i.e.,* all information that the physician should know would be considered significant by a reasonable person in the patient's position. *Truman v Thomas* (1980) 27 C3d 285, 290, 165 CR 308; *McKinney v Nash* (1981) 120 CA3d 428, 440, 174 CR 642 (to be material, fact must be one that is not commonly appreciated; seriousness of result can be weighed against rarity in determining materiality). See *Jamison v Lindsay* (1980) 108 CA3d 223, 231, 166 CR 443 (information on whether to seek additional treatment following surgery). See also *Piedra v Dugan* (2004) 123 CA4th 1483, 21 CR3d 36 (7-month-old child apparently had bad reaction to drug used to calm him so that valid electrocardiogram results could be obtained; jury found that doctor breached no duty to inform parents about use of drug; such use was common and risk of serious side effects rare).

A doctor is not liable for failing to inform the patient of an alternative treatment if that treatment could not legally be administered in the state. *Schiff v Prados* (2001) 92 CA4th 692, 112 CR2d 171 (controversial cancer treatment was outlawed by California statute but was available in Texas).

The doctor's duty to disclose does not ordinarily need to be established by expert medical testimony of a medical community standard. *Cobbs v Grant* (1972) 8 C3d 229, 236, 104 CR 505; *Spann v Irwin Mem. Blood Ctrs.* (1995) 34 CA4th 644, 655, 40 CR2d 360 (failure to provide expert testimony about industry practice or custom on telling transfusees of potential for HIV infection not fatal to informed consent cause of action). On the other hand, medical expert testimony is relevant and admissible to establish what disclosures, in addition to those relating to the risk of serious injury or death, a skilled practitioner in the relevant medical community would make to patients under the circumstances. *Arato v Avedon* (1993) 5 C4th 1172, 1191, 23 CR2d 131. But it can be error, in some circumstances, to instruct jurors to consider *only* expert testimony in determining (1) whether certain information should have been communicated, or (2) the adequacy of the timing and method of the physician's disclosure. See *Betterton v Leichtling* (2002) 101 CA4th 749, 124 CR2d 644 (see §9.32); *Daum v Spinecare Med. Group* (1997) 52 CA4th 1285, 61 CR2d 260 (Health & S C §§24170-24179, the Protection of Human Subjects in Medical Experimentation Act, required disclosure).

A patient's signature on a consent form is not conclusive proof of informed consent; whether actual informed consent was given is "a peculiarly fact-bound assessment which juries are especially well-suited to make." *Quintanilla v Dunkelman* (2005) 133 CA4th 95, 34 CR3d 557 (patient told to "sign here" on Spanish language form she testified she could not read).

To recover for a doctor's failure to disclose an inherent risk of proposed treatment, the plaintiff must establish causation by showing that a prudent person in the patient's position would have declined the treatment had he or she known the risk. *Cobbs v Grant* (1972) 8 C3d 229, 245, 104 CR 505 ("objective" test applies); *Wilson v Merritt* (2006) 142 CA4th 1125, 48 CR3d 630 (jury questions whether doctor supervising chiropractor in performing procedure on

anesthetized paraplegic patient had duty to disclose dangers of procedure and whether patient would have declined it had he been informed); *Warren v Schecter* (1997) 57 CA4th 1189, 1205, 67 CR2d 573 (surgeon failed to tell patient that osteoporosis followed proposed ulcer surgery in 38 percent of patients; patient need not prove, subjectively, that *she* would have refused surgery had the doctor told her only that a reasonable prudent person would have refused; defendants may, nevertheless, seek to prove, as a defense, that the particular patient would have consented to surgery even if the risk had been disclosed). See *Spann v Irwin Mem. Blood Ctrs.* (1995) 34 CA4th 644, 657, 40 CR2d 360 (evidence showed that patient and husband knew of HIV-infection risk before she chose to undergo plasmapheresis for serious condition); *Traxler v Varady* (1993) 12 CA4th 1321, 16 CR2d 297 (no informed consent liability for furnishing HIV-tainted blood); *Mathis v Morrissey* (1992) 11 CA4th 332, 339, 13 CR2d 819 (proposed instruction that physician has duty to inform patient of alternative treatments and schools of thought properly rejected); *Morgenroth v Pacific Med. Ctr.* (1976) 54 CA3d 521, 534, 126 CR 681 (no evidence that plaintiff would not have consented if fully informed).

The plaintiff has the initial burden of producing evidence of nondisclosure, and the doctor must then produce evidence of justification, *e.g.,* that an emergency precluded informing the patient, that the patient asked not to know the risks, that the procedure was simple and the danger remote, or that the doctor relied on facts that would demonstrate to a reasonable person that disclosure would have so upset the patient that he would not have been able to weigh the risks dispassionately. See *Contreras v St. Luke's Hosp.* (1978) 78 CA3d 919, 927, 144 CR 647 (no liability; disclosure was sufficient); *Slater v Kehoe* (1974) 38 CA3d 819, 113 CR 790 (no liability for failure to inform patient of remote risk of proposed manipulative treatment).

Ordinarily, the duty to inform is imposed only on the doctor who rendered the treatment that caused injury. See *Mahannah v Hirsch* (1987) 191 CA3d 1520, 237 CR 140 (absent expert medical testimony to contrary, pathologist testing tissue sample must convey results to referring surgeon, not to patient or patient's primary physician, even if results might have changed physician's diagnosis and spared patient from undergoing injurious chemotherapy). See also *Townsend v Turk* (1990) 218 CA3d 278, 266 CR 821 (informed consent liability not imposed on consultant radiologist whose professional duties were confined to rendering advice to patient's doctor).

When proposed treatment is experimental, doctors must give fair warning of risks that are known or that reasonably should have been known to them, but are not required to warn of an unperceived risk of which reasonably they were not aware. *Goodman v U.S.* (9th Cir 2002) 298 F3d 1048, 1057 (consent form signed by patient not vitiated by failure to specify complications experienced by others in experimental study).

See Annos, 89 ALR4th 799 (1991) (need for patient's consent in pregnancy and childbirth cases), 12 ALR4th 41 (1982) (duty to warn patient of subsequently discovered danger from treatment previously given), 88 ALR3d 1008 (1978) (duty to inform patient of risks of proposed treatment). See also *Evidence of Informed Consent—Don't Let It Ruin Your Case,* 34 CAOC Forum No. 10, p19 (Consumer Attorneys of California), Dec. 2004.

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§9.12 (2) Risks of Nontreatment

A doctor may be liable for injury resulting from a negligent failure to inform a patient of the dangers of *not* undergoing a prescribed test or procedure. See *Truman v Thomas* (1980) 27 C3d 285, 290, 165 CR 308 (failure to inform of risks of not having Pap smear test). But see *Parris v Sands* (1993) 21 CA4th 187, 25 CR2d 800 (no duty to tell patient that a different school of medical thought might prescribe a different course of treatment); *Vandi v Permanente Med. Group* (1992) 7 CA4th 1064, 9 CR2d 463 (no duty to inform patient of diagnostic test that is, in doctor's nonnegligent professional judgment, not medically indicated); *Scalere v Stenson* (1989) 211 CA3d 1446, 260 CR 152 (no duty to disclose risks of nontreatment; doctor must have recommended a procedure); *Munro v Regents of Univ. of Cal.* (1989) 215 CA3d 977, 263 CR 878 (follows *Scalere*).

A doctor who refers a patient to a specialist must inform the patient of all material information on the benefits of seeing the specialist, so that the patient may make an informed decision whether to do so. *Moore v Preventive Medicine Med. Group, Inc.* (1986) 178 CA3d 728, 223 CR 859 (doctor failed to inform patient about risks of not being examined by a specialist).

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§9.13 (3) Patient's Medical Condition and Nonmedical Interests; Life Expectancy

Separate from a doctor's duty to disclose all material information needed for an informed consent about proposed treatment is a duty not to misrepresent the nature of the patient's medical condition. *Hahn v Mirda* (2007) 147 CA4th 740, 748, 54 CR3d 527 (doctor's alleged failure to disclose post-surgery knowledge that patient did not have cancer for which chemotherapy and operation were performed, leaving patient and spouse with belief she had terminal illness, was actionable).

A doctor's duty to inform does not necessarily include a duty to inform the patient that, statistically, undergoing the proposed treatment produces little increase in life expectancy. It is for the jury to decide whether the physician knew or should have known that a reasonable person in the patient's position would have regarded the particular information as significant in deciding to accept or reject a recommended course of treatment. A physician has no duty to disclose information material to patient's "nonmedical" interests. *Arato v Avedon* (1993) 5 C4th 1172, 1188, 23 CR2d 131 (heirs claimed that life expectancy information would have permitted decedent to decide to forgo rigors of treatment and use his remaining time to put his financial affairs in order). See §9.32 on use of expert testimony on disclosure questions.

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§9.14 (4) Doctor's Interest in Suggested Treatment

A doctor who proposes a procedure from which the doctor may benefit in a way that is unrelated to the patient's health, such as removing tissue for sale or use in research, may have a duty to disclose such interests to the patient, who may then assess their effect on the physician's judgment. See *Moore v Regents of Univ. of Cal.* (1990) 51 C3d 120, 129, 271 CR 146.

See Annos, 16 ALR5th 143 (1993) (doctor's use of patient's tissues, cells, or bodily substances for medical research or economic purposes), 4 ALR5th 1000 (1992) (surgically invading incompetent or minor for benefit of third party).

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§9.15 (5) Statutes Affecting Duty to Inform

A physician or podiatrist is not liable for a failure to inform in certain emergency situations when the patient was unconscious or the doctor reasonably believed that there was insufficient time to fully inform. Bus & P C §2397.

AIDS-antibody testing may not be performed without the patient's written consent, except when performed (1) as required by law for the protection of blood or blood components, (2) at a designated "alternative test site," (3) as part of certain anonymous scientific investigations, or (4) as part of an autopsy. Health & S C §120920.

A doctor has a statutory duty to inform a patient, by means of a standardized written summary, of alternative methods of breast cancer treatment. Health & S C §109275.

Informed consent for a hysterectomy requires oral and written disclosures that the patient will be rendered permanently sterile, a signed acknowledgment of the disclosure, and notification that the patient is entitled to a second opinion. Copies of the signed consent must be given to the patient and kept in the medical record. 22 Cal Code Regs §70707.5.

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Source: Torts/California Tort Guide/9 Medical Malpractice/§9.16 2. Battery: Unauthorized Surgery or Treatment

§9.16 2. Battery: Unauthorized Surgery or Treatment

A doctor who performs an operation to which the patient has not consented, or that is substantially different from the treatment to which the patient consented, has committed battery. See *Cobbs v Grant* (1972) 8 C3d 229, 239, 104 CR 505 (rule stated); *Berkey v Anderson* (1969) 1 CA3d 790, 803, 82 CR 67 (myelogram with spinal puncture not within tacit consent to electromyogram). See also *Kaplan v Mamelak* (2008) 162 CA4th 637, 645, 75 CR3d 861 (fact question whether surgeon's operation on adjacent disk was battery when patient consented to "thoracic eight-nine transverse pedicular diskectomy"). See Anno, 56 ALR2d 695 (1957) (liability for extending operation or treatment beyond that authorized).

Medical battery on allegations that a defendant performed a procedure without the patient's consent (see CACI 530A) is distinct from that in which the patient gave conditional consent and the defendant proceeded although the condition had not been satisfied (see CACI 530B). *Dennis v Southard* (2009) 174 CA4th 540, 94 CR3d 559 (no liability when surgeon used replacement knee although patient had conditioned operation on use of different manufacturer's replacement knee).

The cause of action for battery (performing a surgery or treatment to which the patient has not consented) must be distinguished from the negligence cause of action for obtaining the patient's consent without disclosing sufficient information about inherent risks (see §§9.11-9.15). *Saxena v Goffney* (2008) 159 CA4th 316, 324, 71 CR3d 469 (although special verdict supported negligence liability, it did not contain questions the answers to which would have supported battery liability; failure to apply MICRA limits (see §§9.80-9.84) to damages was error).

The doctor is liable for any injury or disability that results from the unauthorized treatment even though it was skillfully performed. *Berkey v Anderson, supra*. See also *Ebaugh v Rabkin* (1972) 22 CA3d 891, 99 CR 706 (patient underwent operation scheduled for another patient; compensatory damages for battery but no punitive damages, because no evidence of malice, only mix-up of charts).

Consent to medical care, including surgery, may be either express or implied from the circumstances. *Kritzer v Citron* (1950) 101 CA2d 33, 38, 224 P2d 808, 811 (consent inferred from conduct). Thus, a general consent to particular treatment impliedly includes consent to the normal incidents of that treatment. *Bradford v Winter* (1963) 215 CA2d 448, 454, 30 CR 243, 246 (biopsy as part of bronchoscopy). See *Traxler v Varady* (1993) 12 CA4th 1321, 16 CR2d 297 (no battery liability for furnishing HIV-tainted blood). See also *Kerins v Hartley* (1994) 27 CA4th 1062, 1075, 33 CR2d 172 (HIV-infected doctor who performed surgery may have gone beyond patient's implied consent, but fact that patient's fear of being infected not based on medical corroboration vitiated battery liability for emotional distress damages); *Freedman v Superior Court* (1989) 214 CA3d 734, 263 CR 1 (doctor who, to induce patient to take it, falsely said that contraction-augmenting drug was antibiotic not liable for battery, but could be liable for negligence or misrepresentation).

The patient's general consent does not, however, authorize a substantially different treatment or surgery. *Valdez v Percy* (1939) 35 CA2d 485, 491, 96 P2d 142, 145 (breast removed following biopsy on axillary gland). See *Perry v Shaw* (2001) 88 CA4th 658, 106 CR2d 70 (surgeon alleged to have obtained patient's consent to perform previously rejected breast enlargement procedure only after she had been medicated and taken to operating room; MICRA ceiling on noneconomic damages (see §9.86) inapplicable). Further, a patient's conditional consent requires the doctor to verify that the condition exists before proceeding. See *Grieves v Superior Court* (1984) 157 CA3d 159, 165, 203 CR 556 (patient allegedly consented to tubal ligation following childbirth only if child born without abnormality). See also *Ashcraft v King* (1991) 228 CA3d 604, 278 CR 900 (surgeon to use only family-donated blood for transfusion); *Rains v Superior Court* (1984) 150 CA3d 933, 198 CR 249 (doctor to use physical force only for therapeutic purposes, not to control patient). Further, doing less than the patient authorized would not ordinarily constitute a medical battery. See *Conte v Girard Orthopaedic Surgeons Med. Group* (2003) 107 CA4th 1260, 1268, 132 CR2d 855 (surgeon authorized by patient to "fix" fractured bone with screw committed no battery when, after opening joint, he left bone unfixed).

A doctor can operate or treat without the patient's consent in an emergency or when immediate action is otherwise necessary and it is impracticable to obtain consent. *Wheeler v Barker* (1949) 92 CA2d 776, 781, 208 P2d 68, 71; *Preston v Hubbell* (1948) 87 CA2d 53, 57, 196 P2d 113, 115. However, an extension of surgery may constitute a

battery if the claimed emergency did not actually exist. *Hundley v St. Francis Hosp.* (1958) 161 CA2d 800, 802, 327 P2d 131, 133. See *Gist v French* (1955) 136 CA2d 247, 268, 288 P2d 1003, 1017, disapproved on other grounds at 54 C2d 478 (doctor may need patient's informed consent before undertaking second, separate operation to rectify negligently created condition).

Operating on a minor or an incompetent is not battery if the doctor has a parent's consent or if it is an emergency and obtaining a parent's consent appears impracticable. See *Farber v Olkon* (1953) 40 C2d 503, 509, 254 P2d 520, 524. Moreover, in some situations a minor's consent to treatment is sufficient and would bar a parent's lawsuit. See Fam C §§6920-6929; *Carter v Cangello* (1980) 105 CA3d 348, 164 CR 361 (statute bars causes of action for unauthorized treatment and for intentional infliction of emotional distress).

On procedures to obtain consent to provide electroconvulsive treatment to a patient being detained under the Lanterman-Petris-Short Act (Welf & I C §§5150-5550), see *Conservatorship of Pamela J.* (2005) 133 CA4th 807, 35 CR3d 228.

See Annos, 67 ALR4th 511 (1989) (liability for treating child without parents' consent), 25 ALR3d 1439 (1969) (patient's mental competency to consent), 9 ALR3d 1391 (1966) (power to order medical care of adult).

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§9.17 3. Sexual Contact With, or Harassment of, Patient

Sexual contact between a doctor and a patient may constitute medical malpractice or other actionable torts. See, *e.g., Marlene F. v Affiliated Psychiatric Med. Clinic, Inc.* (1989) 48 C3d 583, 257 CR 98 (boys molested by psychotherapist; mothers' cause of action for negligent infliction of emotional distress); *Cooper v Superior Court* (1997) 56 CA4th 744, 65 CR2d 674 (punitive damages claim for alleged sexual battery by gynecologist required compliance with CCP §425.13; see §9.29); *McNall v Summers* (1994) 25 CA4th 1300, 1312, 30 CR2d 914 (psychiatrist's sexual relations with patient); *Patricia C. v Mark D.* (1993) 12 CA4th 1211, 16 CR2d 71 (psychologist-patient sexual contact). See also *Atienza v Taub* (1987) 194 CA3d 388, 239 CR 454 (medical malpractice only if doctor induced patient to engage in sexual relations on pretext that it was necessary part of treatment).

NOTE: Under American Medical Association guidelines, the two broad types of physician sexual misconduct are (1) misconduct arising from an inability to contain or control an emotional involvement with the patient and (2) conscious exploitation of the physician's status, knowledge, and power to coerce or trick the patient into sexual conduct. See *Lisa M. v Henry Mayo Newhall Mem. Hosp.* (1995) 12 C4th 291, 303 n7, 48 CR2d 510 (hospital's vicarious liability for technician's sexual molestation of patient; see §9.60). See also Bus & P C §2960 (sexual abuse, relations, and misconduct that constitute "unprofessional conduct" for a psychologist or psychological assistant); *John Y. v Chapparal Treatment Ctr., Inc.* (2002) 101 CA4th 565, 124 CR2d 330 (counselor at facility for emotionally troubled youth).

The statute of limitations on suits for childhood sexual abuse is noted in §1.29.

Allegations of sexual battery may negate coverage by a health care practitioner's professional insurance policy. See *Marie Y. v General Star Indem. Co.* (2003) 110 CA4th 928, 2 CR3d 135 (dentist's insurer had duty to defend but not to indemnify; see Note in §1.12). See Anno, 60 ALR5th 307 (1998) (insurance coverage of doctors' and other healers' sexual contact with patients).

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§9.18 4. Breach of Guaranty or Warranty of Result

A doctor who expressly guarantees or warrants a cure or a specified result may be liable for breach of contract if that result is not achieved. *Depenbrok v Kaiser Found. Health Plan* (1978) 79 CA3d 167, 144 CR 724 (doctor said tubal ligation was permanent and irreversible); *Custodio v Bauer* (1967) 251 CA2d 303, 315, 59 CR 463, 471 (agreement to sterilize patient); *Crawford v Duncan* (1923) 61 CA 647, 650, 215 P 573, 574 (warrant that treatment would leave no scar).

On the other hand, a doctor does not *impliedly* guarantee results merely by undertaking professional service. *Sanchez v Rodriquez* (1964) 226 CA2d 439, 449, 38 CR 110, 116. See *Contreras v St. Luke's Hosp.* (1978) 78 CA3d 919, 928, 144 CR 647 (statement to patient that he would be out of hospital in 3 days created no liability when unexpected infection required longer stay).

Liability for breach of contract or warranty cannot be based solely on a doctor's general statement that a proposed operation will be simple and without problems and that the result will be good, nor can a contract or warranty be implied from a doctor's silence about the proposed procedure. *McKinney v Nash* (1981) 120 CA3d 428, 442, 174 CR 642. See *Pulvers v Kaiser Found. Health Plan* (1979) 99 CA3d 560, 564, 160 CR 392 (statement in health plan brochure that defendants' plan and its employees would provide "high standards" of medical service did not create higher than usual standard of care and was not warranty of specified result or basis of liability for breach of warranty or contract).

See Anno, 99 ALR3d 303 (1980) (damages in action for breach of contract to achieve particular result or cure).

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§9.19 5. Fraud (Misrepresentation)

A doctor can be liable to a patient for the intentional tort of fraud, in which case a 3-year statute of limitations applies and punitive damages can be recovered. *Nelson v Gaunt* (1981) 125 CA3d 623, 636, 178 CR 167 (doctor knowingly and intentionally said he could safely administer silicone even though he lacked required permit to do so and did not tell patient of dangers or restrictions). See *Willard v Hagemeister* (1981) 121 CA3d 406, 416, 175 CR 365 (proof that dentists said that tooth could be saved through "30-minute" procedure when they should have known that prognosis was uncertain could give rise to liability for misrepresentation). See also *Stevens v Superior Court* (1986) 180 CA3d 605, 225 CR 624 (hospital's fraud in concealing fact that unlicensed doctors acted as staff physicians without supervision as required by statute).

Although some preoperation statements can amount to fraud, a fraud cause of action cannot be based solely on proof that a surgeon failed to attain a promised result. *Stone v Foster* (1980) 106 CA3d 334, 345, 164 CR 901 (doctor said that proposed surgery was simple and safe, would lower scar, and would leave plaintiff's abdomen smooth, and that plaintiff would be pleased with result).

A judgment against a doctor based on allegations of a false representation about the need for a medical procedure is not dischargeable in bankruptcy. See *Lee-Benner v Gergeley* (9th Cir 1997) 110 F3d 1448.

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§9.20 6. Inflicting Emotional Distress

Doctors and other health care providers, in the ways in which they interact with patients, can become liable for the torts of negligent, and intentional, infliction of emotional distress. See, *e.g., Molien v Kaiser Found. Hosps.* (1980) 27 C3d 916, 167 CR 831 (doctors negligently and incorrectly told patient that she had syphilis and should tell her husband).

Cases in which a mother's emotional distress arose from injury to a child during pregnancy and birth include: *Burgess v Superior Court* (1992) 2 C4th 1064, 9 CR2d 615 (mother, as "direct victim," not "bystander," entitled to compensation for negligent infliction of emotional distress when child injured during delivery); *Zavala v Arce* (1997) 58 CA4th 915, 68 CR2d 571 (mother whose child died in utero entitled to damages for her own emotional distress but not for emotional distress from loss of filial consortium); *Mercado v Leong* (1996) 43 CA4th 317, 50 CR2d 569 (obstetrical specialist may be liable for emotional distress experienced by mother because of injury to child when specialist sent family practitioner to attend birth in specialist's stead).

For extensive discussion of the bases for these kinds of liability, and of available damages, see California Tort Damages §§6.6, 6.16-6.29 (2d ed Cal CEB 2002).

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§9.21 7. Invading Patient's Privacy Rights

Doctors who reveal confidential information about a patient in violation of the Confidentiality of Medical Information Act (CMIA) (CC §§56-56.37) can be liable for emotional distress and other damages. See *Pettus v Cole* (1996) 49 CA4th 402, 57 CR2d 46. See also *Susan S. v Israels* (1997) 55 CA4th 1290, 67 CR2d 42 (liability of defense attorney who read and forwarded to defense witness plaintiff's confidential records received by subpoena duces tecum from mental health treatment facility). For discussion of the invasion of privacy tort, see California Tort Damages, chap 9 (2d ed Cal CEB 2002).

NOTE: In the unpublished portion of a partially published opinion, a court of appeal affirmed the imposition of liability for medical malpractice and for violation of the CMIA (but not for invasion of privacy) on a doctor who revealed a patient's specific confidential medical condition ("HIV disease") to the patient's employer. See *Francies v Kapla* (2005) 127 CA4th 1381, 26 CR3d 501 (published portion of decision noted in §9.81; unpublished portion printed at 70 CCC 412 and summarized at 33 CWCR 111). A doctor who permits a pharmaceutical salesperson to be present during the examination of a patient may be liable for invading the patient's privacy. See §9.54 on the liability of a pharmaceutical company and its salesperson in such a situation.

The health care provider may be immunized from liability by one of the exceptions provided in the CMIA or by a privilege provided by CC §47. *Colleen M. v Fertility & Surgical Assocs. of Thousand Oaks* (2005) 132 CA4th 1466, 34 CR3d 439 (disclosure to person responsible to pay for medical treatment authorized by CC §56.10(c)(2); disclosure to his attorney authorized by CC §56.10(b)(3)); *Shaddox v Bertani* (2003) 110 CA4th 1406, 2 CR3d 808 (dentist who told police officer's superiors of officer's possible abuse of prescription drugs immunized by CC §56.10(c)(14) as disclosure specifically authorized by law and by §47(b) as privileged communication in proceeding authorized by law); *Garrett v Young* (2003) 109 CA4th 1393, 1 CR3d 134 (CC §56.16 immunized physician treating industrial injury who revealed to patient's employer no more than general nature of patient's condition).

An invasion of privacy claim against a physician who told the patient's disability insurer that she was not disabled and was a fraud and a scam artist can be subject to mandatory arbitration under an agreement to arbitrate "any dispute as to medical malpractice." *Titolo v Cano* (2007) 157 CA4th 310, 68 CR3d 616 (communication to disability insurer, at patient's request, regarding diagnosis and treatment, was rendering of medical services under agreement). See §9.79).

NOTE: The attorney general has opined that a physician who testifies in a civil proceeding about the applicable standard of medical care is immunized by CC §47(b) from tort liability, but may be disciplined by the Medical Board of California for unprofessional conduct if the testimony demonstrates the physician's unfitness or incompetence to practice medicine even though the testimony itself is not the practice of medicine and does not harm any patient. 87 Ops Cal Atty Gen 48 (2004).

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8. Liability in Reproductive Situations

§9.22 a. Birth of Disabled Child; Prenatal Negligence

Doctors and other health care providers whose negligence leaves prospective parents without information that might lead them to choose to avoid conceiving a child (or to choose to abort a fetus) can be liable to a child who is born with genetic physical or mental defects for special damages and "extraordinary expenses." For discussion of the bases for this "wrongful life" liability and of available damages, see California Tort Damages §§5.1-5.12 (2d ed Cal CEB 2002).

In contrast to wrongful life liability, a doctor may be liable for both special and general damages to a child whose *nongenetic* injury results from the doctor's prenatal, even preconception, negligence. *Saunders v U.S.* (9th Cir 1995) 64 F3d 482 (prematurely born child suffered brain hemorrhage; doctor had negligently failed to tell woman that septate uterus, if not surgically corrected, could lead to premature birth). See *Cruz v Superior Court (Advanced OBGYN Med. Group)* (2004) 121 CA4th 646, 17 CR3d 368 (child born with brain damage; mother required to furnish blood for genetic testing); *Libby v Conway* (1961) 192 CA2d 865, 13 CR 830.

See Anno, 111 ALR5th 459 (2003) (state birth-related neurological injury compensation programs).

On damages for prenatal injuries, see Tort Damages §§1.14, 3.20.

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§9.23 b. Birth of Unwanted Child

A doctor can be liable to parents for expenses they incur from the birth of an unwanted child following a negligently performed sterilization or abortion procedure (or providing a defective birth control device), even if the child is healthy and normal.

For discussion of the bases for this liability and of available damages, see California Tort Damages §§5.13-5.15 (2d ed Cal CEB 2002).

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§9.24 B. Causation: Reasonable Medical Probability

The plaintiff in a medical malpractice case must establish that the doctor's complained of act or omission was the legal cause of the patient's injury. *Frantz v San Luis Med. Clinic* (1978) 81 CA3d 34, 39, 146 CR 146 (no evidence of causal connection between doctor's conduct and patient's injuries). See *Contreras v Goldrich* (1992) 10 CA4th 1431, 13 CR2d 394; *Marvin v Talbott* (1962) 216 CA2d 383, 387, 30 CR 893, 896; *Deckard v Sorenson* (1960) 177 CA2d 305, 307, 2 CR 121, 123. On legal causation generally, see §§1.14-1.18.

A plaintiff satisfies the causation element of a malpractice cause of action by producing sufficient evidence to allow the jury to infer that there was "a reasonable medical probability" (not merely a possibility) that the plaintiff would have obtained a better result without the doctor's negligence. *Espinosa v Little Co. of Mary Hosp.* (1995) 31 CA4th 1304, 1315, 37 CR2d 541 (evidence that negligent monitoring of fetus resulted in failure to deliver child in time to prevent avoidable brain damage). The proper test for causation is the "substantial factor" test. *Mayes v Bryan* (2006) 139 CA4th 1075, 44 CR3d 14 (no error in rejecting "but for" instruction; doctor sued for misreading X-ray not prejudiced thereby).

Expert testimony that the surgery performed by defendant doctor was "unnecessary" is enough to raise a triable issue of fact as to causation; the mere fact that unnecessary surgery was performed harms the patient. *Tortorella v Castro* (2006) 140 CA4th 1, 43 CR3d 853 (expert's declaration precluded summary judgment for doctor).

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§9.25 1. Aggravation; Reduced (or Lost) Chance of Survival

A doctor is liable for negligence that aggravates a previous injury or preexisting condition or that causes further injury. *Sweet v Stutch* (1966) 240 CA2d 891, 892, 50 CR 9, 10.

Medical negligence that results in shortening the patient's life may be the basis for liability. See *Pulvers v Kaiser Found. Health Plan* (1979) 99 CA3d 560, 565, 160 CR 392 (liability could be based on inference, based on reasonable medical probability, that decedent's life would have been lengthened by more prompt diagnosis and treatment).

Cases have held, however, that a doctor can be liable for negligence that reduces a patient's chances of surviving an illness or condition only if, at the time of the doctor's act or omission, nonnegligent treatment would have given the patient more than a 50-percent chance of surviving. See *Dumas v Cooney* (1991) 235 CA3d 1593, 1 CR2d 584 (doctors who failed to inform plaintiff of possible lung cancer 2 years earlier not liable). See also *Bromme v Pavitt* (1992) 5 CA4th 1487, 1503, 7 CR2d 608 (heir could not base wrongful death action on medical negligence committed after date on which decedent's chance for survival, even had she received best of care, dropped below 50 percent).

NOTE: To date, no California court has expressly adopted the "lost chance" doctrine, under which a patient whose chances of survival were reduced (*e.g.,* from 40 percent to 10 percent) by a doctor's fault could make a proportional recovery. "Reduced chance of survival" damages are discussed in the uncitable opinion in *Werner v Blankfort* (ordered not published Sept. 28, 1995; former opinion at 36 CA4th 298, 308 (advance reports), 42 CR2d 229).

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§9.26 2. Multiple Causes of Injury

A doctor whose negligence combined with other factors in causing the plaintiff's single, indivisible injury is liable for all the plaintiff's harm and loss (unless, perhaps, expert medical evidence shows the percentage of the injury that is due to factors for which the doctor is not responsible). See *Espinosa v Little Co. of Mary Hosp.* (1995) 31 CA4th 1304, 1315, 37 CR2d 541 (plaintiff not required to apportion damages or to prove that doctor's negligence was a more than 50-percent factor in causing injury). See §§1.69 and 9.83 on the limitation of a doctor's or other tortfeasor's liability for noneconomic damages to each defendant's "percentage of fault."

It is enough that medical malpractice be shown to be *a* legal cause of an injury—it need not be shown that it was the *sole* legal cause. *Logacz v Brea Community Hosp.* (1999) 71 CA4th 1149, 1158, 84 CR2d 257 (other causes may be tortious or not; error not to instruct jury on concurrent causes). See CACI 431 (2003), BAJI 3.77 (9th ed 2002). *Agnew v City of Los Angeles* (1955) 134 CA2d 433, 439, 286 P2d 556, 559. See *Landeros v Flood* (1976) 17 C3d 399, 411, 131 CR 69, on when an intervening act (parents' abuse of child) becomes a cause that supersedes a doctor's negligence (failure to report prior abuse).

See 9 ALR5th 746 (1993) (joint and several liability of physicians whose independent negligence causes indivisible injury).

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Source: Torts/California Tort Guide/9 Medical Malpractice/ C. Preliminary Procedures in Malpractice Lawsuits/§9.27 1. Serving Notice of Intention to Sue; Effect on Limitations Period

C. Preliminary Procedures in Malpractice Lawsuits

§9.27 1. Serving Notice of Intention to Sue; Effect on Limitations Period

Ninety days or more before filing a lawsuit for professional negligence against a medical doctor, hospital, or other health care provider, plaintiff's counsel should give every known defendant a notice of intention to commence the action. CCP §364.

No particular form of notice is required, and the notice may be served in the same way as other papers in a lawsuit. See California Civil Procedure Before Trial §§9.31-9.32, 9.81 (4th ed Cal CEB 2004) for discussion and form. The plaintiff is not required to include in the notice the specific factual basis for each cause of action he or she intends to pursue. *Edwards v Superior Court (Kirianoff)* (2001) 93 CA4th 172, 112 CR2d 838 (causes of action not referred to in the notice can be pleaded in later complaint or amended complaint). Under some circumstances, the notice may be given in the form of a letter sent by facsimile transmission (fax). *Jones v Catholic Healthcare W.* (2007) 147 CA4th 300, 307, 54 CR3d 148 (compliance with consent to be served by fax requirements in CCP §1013(e) not required; giving notice by fax extended period for filing complaint).

NOTE: On the specificity required in stating the nature of the injuries suffered, see *Medical Malpractice Alert: The [CCP §364] 90-Day "Notice of Intent" Trap*, 30 CAOC Forum No. 6, p29 (Consumer Attorneys of California), July/Aug. 2000.

The notice is deemed to have been given on the date it is properly deposited in the mail. *Silver v McNamee* (1999) 69 CA4th 269, 81 CR2d 445 (mailing notice to begin tolling of limitations period as to doctor who rejected certified mail envelope and claimed not to have received regular mail envelope until after statute had expired).

Failure to give the notice does not invalidate a properly filed lawsuit, but it may be grounds for disciplining the attorney. CCP §365; *Toigo v Hayashida* (1980) 103 CA3d 267, 162 CR 874. The notice of intention to sue need not be given if the doctor's alleged liability is for a tort other than professional negligence. See *Noble v Superior Court* (1987) 191 CA3d 1189, 237 CR 38 (battery claim).

NOTE: A plaintiff's attorney must be aware that giving a notice of intention to sue to a health care provider whose liability is to be based on common-law battery or another nonprofessional ground appears not to toll the statute of limitations in the way discussed below.

When Giving Notice Tolls Limitations Statutes

The 1-year limitations period in CCP §340.5 (see §9.74) is tolled for 90 days if the notice of intention to sue is given on one of the last 90 days of the limitations period. *Woods v Young* (1991) 53 C3d 315, 326 n3, 279 CR 613. See CCP §364(d).

EXAMPLE: Assume that June 13, 1996, would otherwise be the last day for filing the complaint, and that the plaintiff served a notice of intention to sue on June 6, 1996 (7 days before the limitations period would otherwise have expired). This plaintiff would appear to have through September 11, 1996, to file the complaint (the 97th day after the day the notice was served and the 90th day after what would otherwise have been the last day). That is, the number of days that remained in the limitations period when the notice was given also remain after the 90-day notice period expires. On the other hand, if the plaintiff had served the notice of intention to sue on or before March 14, 1996 (*i.e.,* more than 90 days before the limitations period expired), June 13, 1996, would have remained the last day on which to file the complaint.

The court in *Woods v Young* (1991) 53 C3d 315, 326 n3, 279 CR 613, also noted that no additional days are added by CCP §356 (tolling for statutory prohibition on commencement of suit). See *Barber v Superior Court* (1991) 234 CA3d 1076, 1080, 285 CR 668 (statute of limitations barred action filed 1 year and 98 days after accrual). See CCP §364(e) on the applicability of the 90-day extension to fictitiously named defendants.

Giving notice of intention to sue during the last 90 days of a limitations period extends the period by 90 days even

when the plaintiff files a complaint the day after giving notice if the complaint names health care providers as "Doe" defendants and is amended to substitute their true names within the extended period. *Davis v Marin* (2000) 80 CA4th 380, 94 CR2d 896 (complaint also named product liability defendants and was filed before limitations period against them expired).

The 3-year limitations period in CCP §340.5 (see §9.73) is tolled for 90 days if the notice of intention to sue is served on one of the last 90 days of the limitations period. *Russell v Stanford Univ. Hosp.* (1997) 15 C4th 783, 64 CR2d 97.

Similarly, the 3-year limitations period in CCP §340.5 for actions filed by minors (see §9.75) is tolled for 90 days if the notice of intention to sue is served on one of the last 90 days of the limitations period. *Newman v Burnett* (1997) 54 CA4th 722, 62 CR2d 175 (notice of intent to sue served on day before third anniversary of surgery; suit could be filed on 90th day after that third anniversary, the 91st day after service of the notice).

Further, such service tolls the time within which to serve a suit for equitable indemnity "based upon" alleged medical malpractice even though the limitations period for that suit is not established by the statute of limitations for a medical malpractice suit. *Preferred Risk Mut. Ins. Co. v Reiswig* (1999) 21 C4th 208, 215, 87 CR2d 187 (insurance company, having paid a damages settlement to an injured person, sued doctors alleging the injury was caused by medical malpractice; suit was subject to former CCP §340(3), general limitations statute for tort claims; see now CCP §335.1).

Serving a notice of intention to sue within 90 days of the end of the 6-month period within which suit must be filed after the denial of a claim against a public entity also extends that 6-month period. *Wurts v County of Fresno* (1996) 44 CA4th 380, 51 CR2d 689. See also *Anson v County of Merced* (1988) 202 CA3d 1195, 249 CR 457 (effect of serving notice on governmental entity).

Serving a notice of intention to sue does not, however, extend the limitations period on an action against a health care provider that seeks the enhanced remedies available under the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15705.40). *Smith v Ben Bennett, Inc.* (2005) 133 CA4th 1507, 35 CR3d 612 (alleged abuse in skilled nursing facility not encompassed within "professional negligence" to which CCP §364(f) applies).

Defective (or Second) Notice; Notice to Other Persons

The filing of a notice of intention to sue has no tolling effect if another notice of intention to sue the same defendant was previously filed. *Bennett v Shahhal* (1999) 75 CA4th 384, 89 CR2d 272 (plaintiff's second attorney filed suit within 90 days of filing notice of intention to sue unaware that plaintiff's first attorney had filed such a notice more than 90 days before 1-year period would have expired).

A limitations period is not tolled for a particular defendant by a notice given to another person or entity. Thus, the time within which to sue individual doctors is not extended by giving notice of intention to sue to the hospital where they worked. See *Hanooka v Pivko* (1994) 22 CA4th 1553, 28 CR2d 70 (doctors named in notice mailed to hospital medical records department); *Godwin v City of Bellflower* (1992) 5 CA4th 1625, 1629, 7 CR2d 524 (doctors not named in notice). See also *Derderian v Dietrick* (1997) 56 CA4th 892, 65 CR2d 800 (notice letter mailed to entity that sent bill for doctor's services; plaintiffs unaware that doctor had provided medical services to the patient under contract with other doctor on whose behalf bill was sent; plaintiffs should have obtained defendant doctor's address from the Medical Board of California).

NOTE: A doctor's mailing address (and other information) is available at the website http://www.medbd.ca.gov.

Causes of Action for Which Statute May Be Tolled

Giving the notice within the last 90 days tolls the applicable limitations statute if the cause of action is for negligence in connection with the rendering of professional services, even though it is not for a failure to provide professional care, skill, or diligence. *Bellamy v Appellate Dep't* (1996) 50 CA4th 797, 57 CR2d 894 (injuries sustained in fall from X-ray table). Giving the notice in a case in which it is not required, however, appears not to toll the applicable limitations period. See *Noble v Superior Court* (1987) 191 CA3d 1189, 237 CR 38.

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§9.28 2. Giving Disclosure Authorization With Presuit Settlement Offer

A potential plaintiff who, before filing suit, offers to settle a medical malpractice claim must accompany the offer with the patient's authorization for disclosure of medical information to anyone insuring or defending the doctor's professional liability. CC §56.105.

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Source: Torts/California Tort Guide/9 Medical Malpractice/§9.29 3. Filing Amended Complaint, Showing Probability of Prevailing, When Claiming Punitive Damages

§9.29 3. Filing Amended Complaint, Showing Probability of Prevailing, When Claiming Punitive Damages

A claim for punitive damages may be asserted in a medical malpractice action only by means of an amended complaint, filed with leave of court, at least 9 months before the initial trial date, in which the plaintiff must establish that there is a substantial probability that the plaintiff will prevail on the punitive damages claim. CCP §425.13. This procedural requirement applies to all causes of action that arise from the manner in which the defendants provided professional services, including causes of action based on theories of fraud and intentional infliction of emotional distress. *Central Pathology Serv. Med. Clinic v Superior Court* (1992) 3 C4th 181, 186, 10 CR2d 208 (causes of action for defamation or sexual battery, however, said not to be subject to this requirement); *Johnson v Superior Court (Caifornia Cryobank, Inc.)* (2002) 101 CA4th 869, 124 CR2d 650 (suit by and for child conceived with sperm from donor who had history of kidney disease); *Williams v Superior Court* (1994) 30 CA4th 318, 36 CR2d 112 (suit against rehabilitation institute by phlebotomist injured while drawing blood); *Davis v Superior Court* (1994) 27 CA4th 623, 627, 33 CR2d 6 (§425.13 applied despite doctor's alleged participation in criminal scheme to defraud).

The apparent exception to the need to meet CCP §425.13 requirements in suits for sexual battery is itself limited. 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; *Central Pathology* dictum excepting sexual battery did not refer to a touching of genitalia that was "directly related" to the medical services being provided); *United W. Med. Ctrs. v Superior Court* (1996) 42 CA4th 500, 504, 49 CR2d 682 (suit against hospital for failing to protect patient against sexual assault by hospital employees—in effect for breach of hospital's professional duty to provide safe environment where diagnosis and treatment could take place—requires compliance with CCP §425.13). See §9.17 on doctors' liability for sexual torts.

Health care providers sued for violating the Elder Abuse and Dependent Adult Civil Protection Act (see §9.57) are not entitled to invoke CCP §425.13 protections when punitive damages are sought for egregious abuse of those in their care (by failing to attend to their basic needs and comforts) except, perhaps, when the alleged abuse is no more than "professional negligence" in providing medical care. *Covenant Care, Inc. v Superior Court (Inclan)* (2004) 32 C4th 771, 776, 11 CR3d 222 ("skilled nursing facility" alleged to have permitted elder to suffer starvation, dehydration, and infection); *Country Villa Claremont Healthcare Ctr., Inc. v Superior Court (Rodriguez)* (2004) 120 CA4th 426, 15 CR3d 315 (CCP §425.13(a) inapplicable to actions for violation of EADACPA).

NOTE: In *Community Care & Rehabilitation Ctr. v Superior Court* (2000) 79 CA4th 787, 94 CR2d 343, disapproved on other grounds in *Covenant Care, Inc. v Superior Court (Inclan)* (2004) 32 C4th 771, 791 n12, 11 CR3d 222, the court held that CCP §425.13 applied in a suit "whenever the gravamen of an action is *professional* malfeasance—that is, malfeasance in the provision of health care services." On the applicability of MICRA provisions (see §9.85), such as §425.13, to damages suits under the Emergency Medical Treatment and Active Labor Act (EMTALA) (42 USC §1395dd), see §9.86.

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 that are nearly identical to those in CCP §425.13. See *Little Co. of Mary Hosp. v Superior Court (Marin)* 162 CA4th 261, 75 CR3d 519 (section mandates earlier, rather than later, prima facie showing supporting allegations of recklessness, oppression, or fraud).

Filing an amended complaint later than 9 months before the case is first set for trial may be permitted on a showing that it could not be filed earlier because of a local court's "fast track" rules. See *Goodstein v Superior Court* (1996) 42 CA4th 1635, 50 CR2d 459 (setting forth five-part test that plaintiff must meet before 9-month requirement can be waived). See also *Looney v Superior Court* (1993) 16 CA4th 521, 20 CR2d 182 (exception to requirement that request be made at least 9 months before trial date). But see *Freedman v Superior Court* (2008) 166 CA4th 198, 82 CR3d 563 (plaintiff failed to meet two prongs of five-part test; he knew facts in sufficient time to meet statutory deadline and failed to conduct reasonably diligent discovery before the deadline).

A defendant's failure to object before trial (*e.g.,* by demurrer or motion to strike) to the plaintiff's noncompliance with CCP §425.13 can amount to a waiver of the objection. *Vallbona v Springer* (1996) 43 CA4th 1525, 51 CR2d 311 (motion in limine was too late).

For discussion of how the showing of the probability of prevailing is to be made, see *College Hosp., Inc. v Superior Court* (1994) 8 C4th 704, 34 CR2d 898; *Aquino v Superior Court* (1993) 21 CA4th 847, 26 CR2d 477; *Looney v Superior Court, supra*.

For further discussion of recovering punitive damages in malpractice cases, see California Tort Damages §§15.53-15.55 (2d ed Cal CEB 2002). See Anno, 35 ALR5th 145 (1996) (punitive damages in medical malpractice cases).

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§9.30 D. Pleading Medical Malpractice

Medical malpractice may be pleaded in general terms without specifying the particulars in which the practitioner was alleged to have been negligent. *Landeros v Flood* (1976) 17 C3d 399, 408, 131 CR 69; *Stafford v Shultz* (1954) 42 C2d 767, 774, 270 P2d 1, 6; *Custodio v Bauer* (1967) 251 CA2d 303, 312, 59 CR 463, 469.

A general allegation of negligent treatment or care is usually sufficient to permit proof of any malpractice. *Seneris v Haas* (1955) 45 C2d 811, 834, 291 P2d 915, 928 (failure to perform laminectomy); *Barham v Widing* (1930) 210 C 206, 212, 291 P 173 (dental surgeon's inadequate postoperative care); *Dimock v Miller* (1927) 202 C 668, 671, 262 P 311, 312 (use of unsterile instruments); *Mishalow v Horwald* (1964) 231 CA2d 517, 520, 41 CR 895, 897 (negligent administration of anesthetic). Nevertheless, confusion can be lessened by separately stating counts for such forms of malpractice as (1) medical negligence in diagnosis and treatment, (2) medical negligence in failing to adequately inform the patient of the dangers of proposed treatment, and (3) battery for performing an operation without having obtained consent. See *Rainer v Community Mem. Hosp.* (1971) 18 CA3d 240, 255, 95 CR 901 (amendment of complaint to raise consent issue should have been permitted at trial).

The court has broad discretion to permit pleadings to be amended, even at trial, to conform to proof. See *Nelson v Gaunt* (1981) 125 CA3d 623, 636, 178 CR 167 (original complaint for negligence and battery by use of illegal substance later amended to add causes of action for fraud and intentional infliction of emotional distress). But see *Andalon v Superior Court* (1984) 162 CA3d 600, 614, 208 CR 899 (complaint for emotional distress resulting from doctor's failure to detect Down's syndrome in utero cannot be amended after statute of limitations has run to add cause of action for mother's bodily injury from negligent treatment).

A class action is an inappropriate way to determine medical malpractice liability to numerous patients based on theories of fraud (see §9.19), negligent failure to inform (see §9.11), battery (see §9.16), or a medical center's failure to provide adequate coronary care. See *Brown v Regents of Univ. of Cal.* (1984) 151 CA3d 982, 198 CR 916 (because individual issues predominate over common questions of law and fact, members of the proposed class do not establish a sufficient community of interest).

See Anno, 25 ALR4th 706 (1983) (jurisdiction over nonresident physician, dentist, or hospital).

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§9.31 E. Proving Medical Negligence and Causation

Neither the existence nor the nonexistence of medical negligence can be found by the court as a matter of law except when the care and skill required in particular circumstances is within the common knowledge of laypersons. *Landeros v Flood* (1976) 17 C3d 399, 410, 131 CR 69; *Barton v Owen* (1977) 71 CA3d 484, 494, 139 CR 494.

Neither medical negligence nor legal cause need be proved conclusively or by direct evidence; circumstantial evidence showing a reasonable probability of negligent causation is sufficient. *Carrasco v Bankoff* (1963) 220 CA2d 230, 240, 33 CR 673, 679 (expert testimony on typical healing of burns); *Sheffield v Runner* (1958) 163 CA2d 48, 52, 328 P2d 828, 830 (extrajudicial statements on failure to hospitalize). See *Keen v Prisinzano* (1972) 23 CA3d 275, 280, 100 CR 82 (defendant doctors' testimony as circumstantial evidence of each other's malpractice in diagnosis and treatment of fracture). But see *Morgenroth v Pacific Med. Ctr.* (1976) 54 CA3d 521, 532, 126 CR 681 (defendant doctor's testimony showed only possibility, not probability, of causation and was thus "speculative and conjecture").

Proof that a doctor's negligence caused the patient's injury is usually based on the testimony of medical experts (see §§9.32-9.37), but it may sometimes be based on common knowledge (see §9.39) or on the res ipsa loquitur presumption (see §§9.40-9.45).

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Source: Torts/California Tort Guide/9 Medical Malpractice/§9.32 1. Expert Medical Testimony

§9.32 1. Expert Medical Testimony

Ordinarily, expert medical testimony is needed to establish that a doctor's breach of duty caused a patient's injury. See *Landeros v Flood* (1976) 17 C3d 399, 410, 131 CR 69 (standard of care could not be decided as a matter of law); *Cobbs v Grant* (1972) 8 C3d 229, 236, 104 CR 505 (finding that decision to operate on ulcer was malpractice could not be based on fact trier's common knowledge); *Hanson v Grode* (1999) 76 CA4th 601, 607, 90 CR2d 396 (doctor's declaration more than sufficient to meet plaintiff's burden on summary judgment); *Jambazian v Borden* (1994) 25 CA4th 836, 30 CR2d 768 (no expert evidence that plaintiff had underlying condition on which negligence and informed consent claims were based); *Willard v Hagemeister* (1981) 121 CA3d 406, 412, 175 CR 365. See also *Williamson v Prida* (1999) 75 CA4th 1417, 1474, 89 CR2d 868 (medical malpractice rules apply in veterinary malpractice cases; here no evidence that doctors' conduct breached professional standard of care).

Expert medical testimony is ordinarily necessary to establish such matters as the following:

- The proper and usual medical practice in diagnosis and treatment (*Moore v Belt* (1949) 34 C2d 525, 529, 212 P2d 509, 511);
- The propriety of a particular medical treatment (*Pink v Slater* (1955) 131 CA2d 816, 817, 281 P2d 272, 273);
- The necessity of surgery performed (*Tortorella v Castro* (2006) 140 CA4th 1, 43 CR3d 853 (expert's declaration precluded summary judgment for doctor));
- The standard of practice regarding disclosing information to cancer patients (*Arato v Avedon* (1993) 5 C4th 1172, 1190, 23 CR2d 131);
- Whether a risk of serious complications from a course of treatment exists (*Betterton v Leichtling* (2002) 101 CA4th 749, 124 CR2d 644);
- Whether a specialist should have been consulted (*Seneris v Haas* (1955) 45 C2d 811, 829, 291 P2d 915, 925);
- The care required of a specialist (*Simone v Sabo* (1951) 37 C2d 253, 257, 231 P2d 19 (oral surgeon));
- Whether assistant surgeons, as well as the surgeon, had a duty to ensure the presence of a replacement heart valve (*O'Connor v Bloomer* (1981) 116 CA3d 385, 391, 172 CR 128); and
- The cause of the patient's injuries (*Siverson v Weber* (1962) 57 C2d 834, 838, 22 CR 337, 338).

Expert testimony on such matters is ordinarily conclusive. *Stephenson v Kaiser Found. Hosps.* (1962) 203 CA2d 631, 635, 21 CR 646, 649. However, an expert's conclusory statement in a declaration that no malpractice was committed, if it does not disclose the matter relied on by the declarant in forming the opinion, is not admissible to support a summary judgment motion. *Kelley v Trunk* (1998) 66 CA4th 519, 78 CR2d 122. See *Garibay v Hemmat* (2008) 161 CA4th 735, 74 CR3d 715 (doctor's testimony that defendant had not breached standard of care, based on medical records not before the court rather than on personal knowledge, did not support summary judgment for defendant); *Johnson v Superior Court (Rosenthal)* (2006) 143 CA4th 297, 49 CA4th 52 (conclusory statements in defense expert's declaration insufficient to support summary judgment for defendant even if plaintiff's expert's declaration was deficient). But see *Hanson v Grode* (1999) 76 CA4th 601, 607, 90 CR2d 396, questioning "excruciating detail" apparently called for by *Kelley*). Further, the trier of fact can still weigh the evidence (*Dunlap v Marine* (1966) 242 CA2d 162, 173, 51 CR 158, 166) and resolve conflicts and draw inferences (*LaMere v Goren* (1965) 233 CA2d 799, 810, 43 CR 898, 904). See Anno, 81 ALR2d 597 (1962) (need for expert evidence).

A trial judge may exclude or strike expert testimony that is based on speculation, or that fails to provide a factual basis or a reasoned explanation for the expert's opinion. *Bushling v Fremont Med. Ctr.* (2004) 117 CA4th 493, 11 CR3d 653 (shoulder injury after gall bladder surgery and abdominal mole biopsy; declarations that injury would not have occurred except for negligence deemed insufficient by majority to defeat summary judgment); *Jennings v Palomar Pomerado Health Sys., Inc.* (2003) 114 CA4th 1108, 8 CR3d 363 (doctor's testimony that it "just sort of makes sense" that surgeon's failure to remove retractor from patient's abdomen caused postoperative infection properly stricken). But see *Powell v Kleinman* (2007) 151 CA4th 112, 127, 59 CR3d 618 (plaintiff's expert's declaration based on reasonable inference from things not said in patient's medical record required reversal of summary judgment for doctor).

A plaintiff may prove medical negligence through the testimony of an expert witness designated by the defendant.

Alef v Alta Bates Hosp. (1992) 5 CA4th 208, 219, 6 CR2d 900 (trial judge erred in precluding plaintiff from introducing testimony of medical expert designated by defendant).

A trial judge may bar a medical expert from testifying if the party presenting the expert failed to meet the requirement of CCP §§2034.210-2034.730 (former CCP §2034) that experts, and the nature of their testimony, be disclosed to adverse parties before trial, although the party may move to amend an expert witness declaration to cover additional subjects. *Bonds v Roy* (1999) 20 C4th 140, 149, 83 CR2d 289 (medical expert whose testimony was to be about damages barred from testifying about standard of care). See *Zellerino v Brown* (1991) 235 CA3d 1097, 1 CR2d 222 (lawsuit dismissed); *County of Los Angeles v Superior Court* (1990) 224 CA3d 1446, 1455, 274 CR 712 (defendant doctor, not listed as expert, could not state expert opinion). See also *Fairfax v Lords* (2006) 138 CA4th 1019, 41 CR3d 850 (defense verdict reversal after defendant delayed furnishing some experts' names until 20 days after "simultaneous" exchange called for by former CCP §2034).

On the other hand, a treating physician named on an expert witness list may give opinion testimony even if the plaintiff filed no expert witness declaration for that physician. *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 91 CR2d 293 (plaintiff had named physician on expert witness list but attached no declaration; declaration requirement applies to physicians retained to form and express opinions, not to physicians who acquire knowledge of relevant facts independently from the litigation and who are then asked to express opinions on, *e.g.,* causal connection between accident and injuries); *Easterby v Clark* (2009) 171 CA4th 772, 778, 90 CR3d 81 (treating physician should have been permitted to testify about causation after plaintiff notified defendant by letter); *Fatica v Superior Court* (2002) 99 CA4th 350, 353, 120 CR2d 904 (trial court erred when it issued in limine order barring treating physician from giving expert testimony). The treating physician called to testify as an expert must, however, have been named, with address, on the expert witness list. *Kalaba v Gray* (2002) 95 CA4th 1416, 116 CR2d 570 (*Schreiber* test not met by reference on list to "all past or present examining and/or treating physicians").

NOTE: *Schreiber* and *Bonds* seem to allow a nonretained treating doctor for whom no declaration was filed to testify as an expert on such matters as standard of care and causation. Of further interest is *Plunkett v Spaulding* (1997) 52 CA4th 114, 131, 60 CR2d 377, disapproved on other grounds in *Schreiber v Estate of Kiser* (1999) 22 C4th 31, 40 n6, 91 CR2d 293, which concluded that a plaintiff should have been permitted to meet what the court believed to be the declaration requirement by submitting a late expert witness declaration for a treating physician asked to testify about the standard of care applicable to another physician. Similarly, *Casteneda v Bornstein* (1995) 36 CA4th 1818, 43 CR2d 10, disapproved on other grounds in *Bonds v Roy* (1999) 20 C4th 140, 149 n4, 83 CR2d 289, concluded that the statement in an expert witness declaration in that case was adequate to permit testimony about medical causation. For more extensive coverage of restrictions on expert witness testimony, see California Civil Discovery Practice §§11.57-11.62 (4th ed Cal CEB 2006); California Expert Witness Guide §§10.2, 10.8 (2d ed Cal CEB 1991).

In federal courts, a trial judge may exclude expert medical testimony that does not satisfy *Daubert* standards for scientific evidence. See *Daubert v Merrell Dow Pharm., Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, applied in *Daubert v Merrell Dow Pharm., Inc.* (9th Cir 1995) 43 F3d 1311). See §§11.8, 11.20 for more on the *Daubert* test. See *Domingo v T.K., M.D.* (9th Cir 2002) 289 F3d 600 (court-appointed expert reported that plaintiff's expert's theory of what caused brain damage after hip replacement surgery was "not scientifically derived" nor based on "objectively verifiable and scientifically valid principles and methodology"); *Jones v U.S.* (ND Cal 1996) 933 F Supp 894, 897, aff'd (9th Cir 1997) 127 F3d 1154, 1157, cert denied (1998) 141 L Ed 2d 728 (testimony that antibiotics, prescribed by dentist, reduced efficacy of birth control pills previously prescribed by gynecologist, excluded under *Daubert* test). But see *Sullivan v U.S. Dep't of the Navy* (9th Cir 2004) 365 F3d 827 (trial judge erred by excluding, on *Daubert* grounds, testimony of well-qualified surgeon that extended length of operation was probable cause of patient's injury); *Kennedy v Collagen Corp.* (9th Cir 1998) 161 F3d 1226 (trial judge improperly rejected doctor's testimony without considering relevant scientific evidence on which witness based conclusion).

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§9.33 a. Expert's Qualifications

Testimony about (1) the standard of practice applicable to the defendant and (2) the cause of the patient's injuries can be received only from a witness who has shown sufficient skill and experience in the field that the testimony is likely to assist the trier of fact in the search for the truth. *Brown v Colm* (1974) 11 C3d 639, 645, 114 CR 128 (rule does not preclude testimony from physician who did not practice in same or similar locality and had not dealt with plaintiff's precise injury); *Seneris v Haas* (1955) 45 C2d 811, 833, 291 P2d 915, 928 (once witness has shown sufficient knowledge, degree of knowledge affects weight, not admissibility, of testimony).

An expert witness may be cross-examined about his or her qualifications (as well as about the subject of the testimony and the matter on which opinions are based and the reasons for them) and about professional publications that have been established as reliable authority, relevant portions of which may be read into evidence. Evid C §721; *Moore v Belt* (1949) 34 C2d 525, 532, 212 P2d 509, 513. See Anno, 86 ALR2d 1038, 1065 (1962) (instructions on weight and reliability of medical testimony).

See generally Evid C §720 (qualification of expert witnesses); California Personal Injury Proof §§6.5-6.26 (Cal CEB 1970) and latest update.

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§9.34 (1) Specialty or Field of Practice

A doctor who has gained knowledge about the standard of care applicable to a medical specialty need not have practiced that specialty to testify about it. *Cline v Lund* (1973) 31 CA3d 755, 766, 107 CR 629 (pathologist who was neither gynecologist nor surgeon testified about gynecological surgery). See *Brown v Colm* (1974) 11 C3d 639, 114 CR 128 (doctor testified, partly on basis of texts, on standard of practice in fistula repair as it existed before he was licensed). See also *Miller v Silver* (1986) 181 CA3d 652, 226 CR 479 (psychiatrist's affidavit about role of certain antibiotics in implant procedures used to oppose plastic surgeon's summary judgment motion); *Chadock v Cohn* (1979) 96 CA3d 205, 157 CR 640 (podiatrist experienced in treating foot injuries should have been permitted to testify on whether doctor met standard of care); *Agnew v City of Los Angeles* (1955) 134 CA2d 433, 436, 286 P2d 556, 557 (general practitioner on surgical issue); *Agnew v City of Los Angeles* (1950) 97 CA2d 557, 564, 218 P2d 66, 72 (pathologist on orthopedic matter); *Mirich v Balsinger* (1942) 53 CA2d 103, 127 P2d 639 (otolaryngologist on plastic surgery); *Hutter v Hommel* (1931) 213 C 677, 681, 3 P2d 554, 556 (homeopath on standard for allopathic physicians).

See Annos, 31 ALR3d 1163 (1970) (competency of general practitioner to testify as expert in action against specialist), 85 ALR2d 1022 (1962) (different school of practice).

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§9.35 (2) Hospital Emergency Department Doctor

A doctor who was "providing emergency care coverage for a general acute care hospital emergency department," at the time of the alleged malpractice, can object to the admission of standard of care testimony from a doctor who had not had substantial emergency room experience during the previous 5 years. Health & S C §1799.110. The 5-year period is measured from the date of the alleged malpractice, not the date of the trial. *Petrou v South Coast Emergency Group* (2004) 119 CA4th 1090, 15 CR3d 64 (physician, board certified in emergency medicine, had practiced such for more than 20 years until about 4½ years before trial started).

Section 1799.110 can be raised to preclude expert testimony if the defendant doctor's treatment was given in a hospital emergency room, even though the care being given was "routine," not "emergency medical services." *James v St. Elizabeth Community Hosp.* (1994) 30 CA4th 73, 35 CR2d 372. See *Zavala v Board of Trustees* (1993)16 CA4th 1755, 1762, 20 CR2d 768 (key question is whether defendant physician was acting as emergency physician in emergency department when alleged malpractice occurred, not whether treatment given was emergency medical care). But see *Jutzi v County of Los Angeles* (1987) 196 CA3d 637, 647, 242 CR 74.

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§9.36 (3) Locality

Expert testimony can be given by an otherwise qualified witness who has not personally practiced in the defendant's city. *Sinz v Owens* (1949) 33 C2d 749, 205 P2d 3. See *Evans v Ohanesian* (1974) 39 CA3d 121, 127, 112 CR 236 (Beverly Hills periodontist testimony about Orange County dentist); *Gist v French* (1955) 136 CA2d 247, 269, 288 P2d 1003, 1018, disapproved on other grounds at 54 C2d 478. A witness's geographic location is but one factor to consider in determining competence to testify; the essential factor is "knowledge of similarity of conditions." *Avivi v Centro Medico Urgente Med. Ctr.* (2008) 159 CA4th 463, 71 CR3d 707 (error to exclude Israeli orthopedist's declaration that defendant had breached standard of care in setting Israeli citizen's broken arm in U.S.; orthopedist averred that he had treated thousands of similar injuries and that treatment in Israel was similar to that in U.S.).

See Annos, 99 ALR3d 1133 (1980) ("locality rule" in suits against nonspecialists), 37 ALR3d 420 (1971) (physician's competence to testify about standard in another locality).

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§9.37 b. Defendant's Testimony and Admissions

A defendant doctor's expert testimony during cross-examination (or during examination as an adverse witness under Evid C §776) can serve to establish both the applicable standard of medical care and whether the physician's conduct conformed to that standard. *Lawless v Calaway* (1944) 24 C2d 81, 90, 147 P2d 604, 608. See *Robinson v Pediatric Affiliates Med. Group, Inc.* (1979) 98 CA3d 907, 910, 159 CR 791 (defendant testified that taping hand so tightly as to impair circulation to fingers would fall below standard of care); *Libby v Conway* (1961) 192 CA2d 865, 870, 13 CR 830, 833. See Anno, 42 ALR5th 1 (1996) (establishing standard of care through physician's admission of negligence). That is, the plaintiff may make out a prima facie case through the defendant's testimony. *Seneris v Haas* (1955) 45 C2d 811, 828, 291 P2d 915, 925; *McCurdy v Hatfield* (1947) 30 C2d 492, 495, 183 P2d 269, 270; *Keen v Prisinzano* (1972) 23 CA3d 275, 279, 100 CR 82.

The plaintiff's case may also be established by evidence of the defendant's extrajudicial admissions. See *Lashley v Koerber* (1945) 26 C2d 83, 89, 156 P2d 441, 444 (X-ray should have been taken); *Sheffield v Runner* (1958) 163 CA2d 48, 51, 328 P2d 828, 830 (patient should have been hospitalized); *Sweet v Stutch* (1966) 240 CA2d 891, 893, 50 CR 9, 10 (hospital accident aggravated injury). The statements must be otherwise admissible. See *Crawford v County of Sacramento* (1966) 239 CA2d 791, 799, 49 CR 115, 121 (intern's statement not admissible against hospital). Further, the statements must admit medical fault or causation. See *Cobbs v Grant* (1972) 8 C3d 229, 238, 104 CR 505 (doctor's statements showing compassion, even remorse, for plaintiff's ordeal not admission of medical negligence); *Lashley v Koerber, supra*.

An inference contrary to a doctor's position may be drawn from an unexplained failure to produce the plaintiff's original medical records. *Thor v Boska* (1974) 38 CA3d 558, 113 CR 296 (doctor admitted negligence in failing to find lump in breast, but claimed that no action on his part could have improved patient's condition).

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§9.38 c. Warnings in Labels and Brochures

Warnings and recommendations in brochures accompanying drugs or medicines may be admissible, not to establish the standard of care, but to show notice to the physician administering or prescribing them. See *Meier v Ross Gen. Hosp.* (1968) 69 C2d 420, 432, 71 CR 903, 912; *Love v Wolf* (1967) 249 CA2d 822, 832, 58 CR 42, 48 (insufficiency of drug warning); *Tangora v Matanky* (1964) 231 CA2d 468, 480, 42 CR 348, 353 (physician's reliance on recommendation). See also *Allen v Leonard* (1969) 270 CA2d 209, 218, 75 CR 840, 847 (pamphlet issued after drug was prescribed properly excluded).

See §9.9 on liability for prescribing drugs and devices.

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§9.39 2. Common Knowledge Exception to Expert Testimony Requirement

Expert medical testimony is not essential to establish malpractice in the relatively few instances in which the medical procedure is so simple, routine, and widely known that medical negligence may be inferred by laypersons from common knowledge. See *Gin Non Louie v Chinese Hosp. Ass'n* (1967) 249 CA2d 774, 787, 57 CR 906, 913 (nurses failed to advise surgeon of patient's worsening condition); *Myers v Ross* (1963) 216 CA2d 645, 649, 31 CR 110, 113 (nerve severed during dental surgery); *Friedman v Dresel* (1956) 139 CA2d 333, 341, 293 P2d 488, 493 (failure to take X-ray when fracture symptoms present); *Gist v French* (1955) 136 CA2d 247, 268, 288 P2d 1003, 1016, disapproved on other grounds at 54 C2d 478 (healthy organs removed); *Norden v Hartman* (1955) 134 CA2d 333, 338, 285 P2d 977, 980 (cast too tight); *Dean v Dyer* (1944) 64 CA2d 646, 653, 149 P2d 288, 291 (caustic substance placed in eye). See also *Franz v Board of Med. Quality Assur.* (1982) 31 C3d 124, 141, 181 CR 732 (physician's disciplinary proceeding; high-risk patient scheduled for surgery in hospital that lacked intensive or cardiac care unit and respirator).

In "common knowledge" cases, as when a foreign object is left in a patient during surgery, it can be error to instruct a jury that findings on the standard of care, or the applicability of res ipsa loquitur, must be based solely on expert testimony. See *Gannon v Elliot* (1993) 19 CA4th 1, 23 CR2d 86.

See §9.42 on use of common knowledge to establish an element of res ipsa loquitur.

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§9.40 3. Res Ipsa Loquitur: Elements; Evidence; Applicability

The res ipsa loquitur presumption (see §§1.35-1.40) establishes a prima facie case of malpractice if substantial evidence exists that the accident or injury

- is of a kind that ordinarily does not occur absent someone's negligence (see §§9.41-9.42);
- was caused by an agency or instrumentality in the exclusive control of the defendant (see §9.43); and
- was not due to any voluntary action or contribution of the patient or plaintiff (see §9.44).

Bardessono v Michels (1970) 3 C3d 780, 788, 91 CR 760; *Ybarra v Spangard* (1944) 25 C2d 486, 489, 154 P2d 687, 689; *Elcome v Chin* (2003) 110 CA4th 310, 316, 1 CR3d 631 (see §9.43).

Expert testimony (see §9.41) or common knowledge (see §9.42), or a combination of them, can show that, in light of past experience, the injury is one that probably resulted from someone's negligence and that the defendant is probably the person responsible. *Clark v Gibbons* (1967) 66 C2d 399, 408, 58 CR 125, 132 (spinal anesthetic wore off before operation completed). See *Siverson v Weber* (1962) 57 C2d 834, 836, 22 CR 337, 338 (disapproving former rule that common knowledge was sole basis for determination). See also Annos, 82 ALR2d 1262 (1962) (physicians), 9 ALR3d 1315 (1966) (hospitals).

Evidence that a particular bad result from an operation or treatment is rare when care is used, combined with evidence indicating negligence on the particular occasion, is usually sufficient to support res ipsa loquitur. *Clark v Gibbons* (1967) 66 C2d 399, 413, 58 CR 125, 131; *McKinney v Nash* (1981) 120 CA3d 428, 439, 174 CR 642 (surgical patient's bad result rarely occurs and could have been caused by negligence); *Cline v Lund* (1973) 31 CA3d 755, 763, 107 CR 629; *Berkey v Anderson* (1969) 1 CA3d 790, 799, 82 CR 67; *Fraser v Sprague* (1969) 270 CA2d 736, 745, 76 CR 37, 42; *Belshaw v Feinstein* (1968) 258 CA2d 711, 722, 65 CR 788, 795. Evidence that a bad result is rare does not, however, by itself support an inference of medical negligence. See *Siverson v Weber* (1962) 57 C2d 834, 839, 22 CR 337; *Slater v Kehoe* (1974) 38 CA3d 819, 830, 113 CR 790.

The applicability of res ipsa loquitur is a question of fact that must be submitted to the jury under conditional instructions whenever there is substantial evidence of each element of the doctrine and reasonable persons may differ as to the balance of probabilities. Evid C §646(c); *Wolfsmith v Marsh* (1959) 51 C2d 832, 835, 337 P2d 70, 72; *Cline v Lund* (1973) 31 CA3d 755, 761, 107 CR 629. It is not necessary that the inference of negligence be compelling or that every other possibility be excluded. *Seneris v Haas* (1955) 45 C2d 811, 826, 291 P2d 915, 923.

If the facts that give rise to application of the res ipsa loquitur presumption are undisputed, an inference of negligence arises as a matter of law and the trial judge may direct a verdict on liability. See *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 789, 172 CR 342. If one or two of the three res ipsa loquitur elements listed above have been conclusively established, the jury may be instructed on only the remaining element or elements. See *Rimmele v Northridge Hosp. Found.* (1975) 46 CA3d 123, 130, 120 CR 39; *Frantz v San Luis Med. Clinic* (1978) 81 CA3d 34, 41, 146 CR 146 (error in form and sequence of res ipsa loquitur instructions).

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a. Probability That Injury Was Negligently Caused

§9.41 (1) Shown by Expert Testimony

Expert testimony may establish that injuries such as the one at issue do not ordinarily occur in the absence of negligence and are ordinarily attributable to a doctor's lack of proper care or skill. *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 166, 41 CR 577, 583 (cardiac arrest during minor eye surgery); *Seneris v Haas* (1955) 45 C2d 811, 824, 291 P2d 915, 922 (paralysis from spinal anesthetic given during childbirth); *Hale v Venuto* (1982) 137 CA3d 910, 919, 187 CR 357 (nerve injury following knee surgery); *Gerhardt v Fresno Med. Group* (1963) 217 CA2d 353, 359, 31 CR 633, 636 (nerve crushed during lymph node removal).

Such expert testimony may be coupled with evidence of specific acts of negligence. *Tomei v Henning* (1967) 67 C2d 319, 323, 62 CR 9 (failure to ascertain condition of ureter); *Clark v Gibbons* (1967) 66 C2d 399, 413, 58 CR 125, 131 (insufficient spinal anesthetic used); *Rawlings v Harris* (1968) 265 CA2d 452, 458, 71 CR 288, 292 (bladder punctured); *Belshaw v Feinstein* (1968) 258 CA2d 711, 722, 65 CR 788, 795 (brain tissue lacerated).

The variety of testimony that has been held to support an inference of negligence from the occurrence of the incident (see *Tomei v Henning* (1967) 67 C2d 319, 322, 62 CR 9, 11) includes the following:

- Ninety percent of cardiac arrest deaths in patients under anesthesia are due to improper airway management (*Quintal v Laurel Grove Hosp., supra*; see also *Edelman v Zeigler* (1965) 233 CA2d 871, 881, 44 CR 114, 121, disapproved on other grounds at 8 C4th 574);
- Severance of a particular nerve would not occur in ordinary circumstances when standard care is used (*Cho v Kempler* (1960) 177 CA2d 342, 350, 2 CR 167, 172; *Mayers v Litow* (1957) 154 CA2d 413, 419, 316 P2d 351, 355));
- Patient, after delivering a child, would not be expected to have paralyzed leg if standard care was exercised (*Ragusano v Civic Ctr. Hosp. Found.* (1962) 199 CA2d 586, 593, 19 CR 118, 122);
- Permanent paralysis does not ordinarily result if due care is used and proper practice is followed (*Seneris v Haas, supra*);
- Physician should be careful to expose and identify the organs and closely guard against severance of the common bile duct (*Guillen v Martin* (1958) 166 CA2d 172, 174, 333 P2d 266, 268); and
- Spinal anesthetics do not usually wear off prematurely if proper care is used (*Clark v Gibbons, supra*).

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§9.42 (2) Based on Common Knowledge

Res ipsa loquitur may be invoked when it is a matter of common, nonexpert knowledge that the type of injury suffered does not ordinarily result from the particular treatment unless someone has been negligent. *Bardessono v Michels* (1970) 3 C3d 780, 789, 91 CR 760. Such situations include the following:

- Injury following routine injections (*Bardessono v Michels, supra; Wolfsmith v Marsh* (1959) 51 C2d 832, 835, 337 P2d 70, 72 (irritation of vein); *Bauer v Otis* (1955) 133 CA2d 439, 444, 284 P2d 133, 136 (nerve injury));
- Objects left in patient after surgery (*Leonard v Watsonville Community Hosp.* (1956) 47 C2d 509, 514, 305 P2d 36, 39 (clamp); *Ales v Ryan* (1936) 8 C2d 82, 96, 64 P2d 409, 417 (sponge); *Fields v Yusuf* (2006) 144 CA4th 1381, 1389, 51 CR3d 277 (sponge left in leg incision; patient entitled to res ipsa loquitur instruction; see also §9.4 on nondelegable duty and "captain of the ship" doctrines); *Mondot v Vallejo Gen. Hosp.* (1957) 152 CA2d 588, 592, 313 P2d 78, 80 (unidentified object); *Bowers v Olch* (1953) 120 CA2d 108, 113, 260 P2d 997, 999 (surgical needle); *Key v Caldwell* (1940) 39 CA2d 698, 702, 104 P2d 87, 89 (sponge); see Anno, 10 ALR3d 9 (1966));
- Failure to instruct patient on postoperative care (*Kerr v Bock* (1971) 5 C3d 321, 324, 95 CR 788); and
- Injury or death during certain operations (*Seneris v Haas* (1955) 45 C2d 811, 825, 291 P2d 915, 923 (paralysis following spinal anesthesia during childbirth); *Cavero v Franklin Gen. Benevolent Soc'y* (1950) 36 C2d 301, 311, 223 P2d 471, 476 (death during removal of tonsils and adenoids); *Ragusano v Civic Ctr. Hosp. Found.* (1962) 199 CA2d 586, 593, 19 CR 118, 122 (paralyzed leg after routine childbirth); *Valentine v Kaiser Found. Hosps.* (1961) 194 CA2d 282, 287, 15 CR 26, disapproved on other grounds at 57 C2d 839 (loss of glans penis after circumcision); *Guillen v Martin* (1958) 166 CA2d 172, 177, 333 P2d 266, 269 (peritonitis after gall bladder operation).

In addition, little or no expert testimony may be necessary if the injuries result from conduct that does not require medical judgment. *Meier v Ross Gen. Hosp.* (1968) 69 C2d 420, 430, 71 CR 903, 909 (mental patient jumped from window). See *Davis v Memorial Hosp.* (1962) 58 C2d 815, 817, 26 CR 633, 634 (enema caused fistula); *Timbrell v Suburban Hosp.* (1935) 4 C2d 68, 71, 47 P2d 737, 739 (hot compresses and water bottles caused burns).

Expert testimony is required (*i.e.,* common lay knowledge does not support an inference that injuries were negligently caused) when the medical procedure at issue is complicated or rare. See *McKinney v Nash* (1981) 120 CA3d 428, 435, 174 CR 642 (testicular atrophy and impotence following bilateral inguinal hernia repair under spinal anesthesia); *Bolen v Woo* (1979) 96 CA3d 944, 955, 158 CR 454 (infection after treatment of foot); *Contreras v St. Luke's Hosp.* (1978) 78 CA3d 919, 930, 144 CR 647 (infection following knee operation); *Barton v Owen* (1977) 71 CA3d 484, 494, 139 CR 494 (brain abscess following failure to test or administer culture). The more complex or unusual the medical process, the more likely it is that expert testimony will be required to establish that medical negligence was the cause of a post-operative injury. *Curtis v Santa Clara Valley Med. Ctr.* (2003) 110 CA4th 796, 803, 2 CR3d 73 (common knowledge insufficient to establish negligence was cause of blindness following back surgery).

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§9.43 b. Defendant's Control of Instrumentality; Unconscious Patient; Multiple Defendants

Evidence that the injury occurred during, and as a result of, a medical or surgical treatment is often sufficient to show a doctor's control of the agency or instrumentality causing the injury. See *Rimmele v Northridge Hosp. Found.* (1975) 46 CA3d 123, 130, 120 CR 39; *Fraser v Sprague* (1969) 270 CA2d 736, 746, 76 CR 37, 44; *Rawlings v Harris* (1968) 265 CA2d 452, 459, 71 CR 288, 292. But see *Elcome v Chin* (2003) 110 CA4th 310, 317, 1 CR3d 631 (failure to produce evidence that neck, arm, and shoulder pain experienced on awakening from anesthesia following abdominal surgery was traumatically caused prevented application of res ipsa loquitur presumption); *Chase v Haber* (1963) 221 CA2d 569, 571, 34 CR 605, 606 (finding against control upheld).

If several persons had partial control over a patient and over the instrumentalities that might have caused the patient's injury, as when the patient suffers unusual injuries while unconscious or otherwise unable to identify the cause, each such person must answer the inference of negligence by explaining his or her own conduct. *Clark v Gibbons* (1967) 66 C2d 399, 410, 58 CR 125, 131 (surgery prematurely terminated when anesthetic wore off); *Leonard v Watsonville Community Hosp.* (1956) 47 C2d 509, 514, 305 P2d 36, 39 (clamp left in abdomen); *Seneris v Haas* (1955) 45 C2d 811, 826, 291 P2d 915, 923 (paralysis following childbirth with spinal anesthetic); *Ybarra v Spangard* (1944) 25 C2d 486, 494, 154 P2d 687, 690 (arm and shoulder injured during appendectomy). See *Hale v Venuto* (1982) 137 CA3d 910, 920, 187 CR 357 ("control" element satisfied as to surgeon even though patient also under "care, custody, and control" of hospital, nurses, and other practitioners); *O'Connor v Bloomer* (1981) 116 CA3d 385, 391, 172 CR 128 (res ipsa loquitur not applicable to assistant surgeons who had no responsibility to assure that replacement heart valve would be available in operating room). See Anno, 67 ALR4th 544 (1989) (multiple defendants).

In multiple-defendant situations, the patient need not identify the particular person or thing responsible. *Gin Non Louie v Chinese Hosp. Ass'n* (1967) 249 CA2d 774, 794, 57 CR 906, 920 (jury instruction). The plaintiff may be required, however, to have sued or joined all persons whose conduct was equally likely to have caused the injury. *Inouye v Black* (1965) 238 CA2d 31, 35, 47 CR 313, 316 (failure to join manufacturer of surgical wire). But see *Ragusano v Civic Ctr. Hosp. Found.* (1962) 199 CA2d 586, 599, 19 CR 118, 124 (new trial against hospital did not require new trial against physicians).

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§9.44 c. Patient's (or Plaintiff's) Conduct

Res ipsa loquitur does not apply if the accident or injury was due to a voluntary action or contribution of the patient (or the plaintiff) that was a responsible cause of the injury. See *Folk v Kilk* (1975) 53 CA3d 176, 184, 126 CR 172. However, even a plaintiff who was active at the time of the accident and participated in the events leading to it may invoke the doctrine if the evidence excludes that conduct as a responsible cause. *Meier v Ross Gen. Hosp.* (1968) 69 C2d 420, 431, 71 CR 903, 909 (suicide by mental patient); *Vistica v Presbyterian Hosp.* (1967) 67 C2d 465, 470, 62 CR 577, 580 (same); *Gin Non Louie v Chinese Hosp. Ass'n* (1967) 249 CA2d 774, 793, 57 CR 906, 919 (delirious patient).

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§9.45 d. Rebutting Res Ipsa Loquitur

When a plaintiff is permitted to invoke the res ipsa loquitur presumption, the defendant has the burden of producing substantial evidence to dispel or balance the inference of negligence. *Gerhardt v Fresno Med. Group* (1963) 217 CA2d 353, 360, 31 CR 633, 636. The defendant must show either (1) a satisfactory explanation of the incident, meaning an affirmative showing of a nonnegligent cause or (2) such care in all possible respects as to compel the conclusion that the accident must have been due to an unpreventable, albeit unknown, cause. *Dierman v Providence Hosp.* (1947) 31 C2d 290, 295, 188 P2d 12, 13; *Dunlap v Marine* (1966) 242 CA2d 162, 167, 51 CR 158, 161.

Liability under res ipsa loquitur involves questions of fact if the elements of the doctrine are disputed (*Davis v Memorial Hosp.* (1962) 58 C2d 815, 818, 26 CR 633, 634) or if substantial rebuttal evidence is presented (*Dunlap v Marine, supra*). When the facts giving rise to the doctrine are undisputed, however, liability is established as a matter of law in the absence of a sufficient explanation. *Dierman v Providence Hosp., supra* (explosion during tonsillectomy); *Gerhardt v Fresno Med. Group* (1963) 217 CA2d 353, 361, 31 CR 633, 637 (nerve severed during hysterectomy).

In actions against multiple defendants, if the conditions of res ipsa loquitur are present when the medical personnel are treated as a group and they collectively have access to the chief evidence of the cause of the injury but the plaintiff does not, a single defendant may not escape the inference as a matter of law merely by showing the improbability of his negligence; he must establish that he is free from negligence by evidence that cannot rationally be disbelieved. Whether the inference has been rebutted as to a particular defendant remains a jury question in the absence of such a showing. *Clark v Gibbons* (1967) 66 C2d 399, 411, 58 CR 125, 131. See *Leonard v Watsonville Community Hosp.* (1956) 47 C2d 509, 518, 305 P2d 36, 42 (doctor conclusively rebutted inference but hospital did not).

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§9.46 4. Doctor's Custom and Practice

Evidence Code §1105 permits testimony that a doctor's "habitual response" was to ask to see an infant when told by telephone of a temperature over 100 degrees, to support the doctor's contention that the child's mother had not reported that symptom. *Dincan v Tamayose* (1982) 131 CA3d 780, 793, 182 CR 855.

See Anno, 10 ALR4th 1243 (1981) (physician's testimony of usual custom or habit to establish nonliability).

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§9.47 5. Impeachment Evidence

Evidence that is admissible to impeach a defendant doctor's veracity as a witness, even though it is seldom relevant to medical malpractice issues, may nonetheless bolster a plaintiff's case. See, *e.g., Nelson v Gaunt* (1981) 125 CA3d 623, 639, 178 CR 167 (evidence of doctor's arrest and conviction of illegal use of silicone, a misdemeanor, was admissible to impeach his testimony that he had not used silicone in treating plaintiff). But see *Truman v Thomas* (1980) 27 C3d 285, 296, 165 CR 308 (doctor's prior conviction of felony—illegally obtaining drugs for personal use—inadmissible under law of another state, even for impeachment, after felony reduced to misdemeanor).

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§9.48 6. Hospital Staff Committee Records and Proceedings

Evidence Code §1157(a) forbids the discovery of the proceedings and records of hospitals' (and specified regulatory groups') organized medical staff committees that are responsible for evaluating and improving the quality of care. The statute also states that no one shall be required to testify about what transpired at a meeting of such a committee. See *Alexander v Superior Court* (1993) 5 C4th 1218, 1223, 23 CR2d 397, partially disapproved at 31 C4th 724 n4 (physician's repeated applications for staff privileges not discoverable); *Snell v Superior Court* (1984) 158 CA3d 44, 204 CR 200 (hospital personnel files consisting of peer review committee records and information about staff doctor's malpractice insurance not discoverable in suit against hospital for negligent selection and retention of staff doctors); *West Covina Hosp. v Superior Court* (1984) 153 CA3d 134, 200 CR 162 (hospital sued for negligent selection and retention of doctor). "Occurrence reports" prepared by hospital personnel in anticipation of litigation are protected from discovery by the attorney-client privilege in Evid C §§950-962. *Scripps Health v Superior Court (Reynolds)* (2003) 109 CA4th 529, 135 CR2d 126 (dominant purpose of reports was transmittal to attorneys, not accident prevention).

The nondisclosure provisions of Evid C §§1157 and 1157.6 also protect documents generated by the chair of a county "quality assurance committee" for "jail mental health services." See *County of Los Angeles v Superior Court* (*Gavira)* (2006) 139 CA4th 8, 42 CR3d 390 (documents sought by survivors of man who hanged himself while in jail for drunk driving). A plaintiff cannot require an expert to testify about conclusions based on hospital peer review committee records, and the court may exclude an opinion based on such privileged material. *Fox v Kramer* (2000) 22 C4th 531, 541, 93 CR2d 497 (records were reviewed by witness as part of investigative inquiry for the California Department of Health Services).

Evidence Code §1157 does not preclude the voluntary testimony of a doctor who served on a medical staff committee, as long as patient names are not disclosed. *West Covina Hosp. v Superior Court* (1986) 41 C3d 846, 226 CR 132.

Further, Evid C §1157 does not prevent the discovery of the following:

- Certain hospital administration records, such as those relating to infection control (*Santa Rosa Mem. Hosp. v Superior Court* (1985) 174 CA3d 711, 220 CR 236); and
- Whether the hospital had evaluated a particular doctor's competence (but not results of evaluation) and whether the hospital required doctors to maintain malpractice insurance (*Brown v Superior Court* (1985) 168 CA3d 489, 214 CR 266).

See Annos, 69 ALR5th 559 (1999) (extent of protection from disclosure of medical peer review proceedings), 47 ALR5th 433 (1997) (discovering names and records of other patients treated by defendant.

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II. OTHER PRACTITIONERS

§9.49 A. Dentists

The same basic liability rules that apply to physicians and surgeons also apply to dentists. These include the following:

- General standard of care (*Barham v Widing* (1930) 210 C 206, 213, 291 P 173, 176 (failure to take precautions against bleeding after extraction); *Walter v England* (1933) 133 CA 676, 679, 24 P2d 930 (needle broke in gums); *Roberts v Parker* (1932) 121 CA 264, 267, 8 P2d 908, 909 (failure to fully investigate cause of toothache); see Anno, 83 ALR2d 7, 23 (1962); see generally §9.1);
- Standard for specialists (*Hopkins v Heller* (1922) 59 CA 447, 452, 210 P 975, 976; see Anno, 83 ALR2d 7, 40 (1962); see generally §9.2);
- Effect of mistaken diagnosis (*Rising v Veatch* (1931) 117 CA 404, 408, 3 P2d 1023, 1024; see generally §§9.1, 9.5);
- Duty to consult or refer patient to specialist (*Simone v Sabo* (1951) 37 C2d 253, 257, 231 P2d 19, 22; see *Clark v Laughlin* (1977) 68 CA3d 506, 513, 137 CR 354 (orthodontist); *Evans v Ohanesian* (1974) 39 CA3d 121, 129, 112 CR 236; see generally §9.6);
- Liability for negligence in prescribing drugs (*Jones v U.S.* (ND Cal 1996) 933 F Supp 894, 901, aff'd (9th Cir 1997) 127 F3d 1154, 1157 (dentist alleged to have prescribed antibiotic without warning patient that it could reduce efficacy of birth control pills previously prescribed by gynecologist; see also discussion of this case in §9.32);
- Breach of guaranty or warranty of results (see *Hopkins v Heller* (1922) 59 CA 447, 456, 210 P 975, 978 (no implied warranty of results); see generally §9.18);
- Liability for unauthorized treatment (see *Preston v Hubbell* (1948) 87 CA2d 53, 57, 196 P2d 113, 115 (consent not essential in emergency); see generally §§9.11-9.16);
- Liability for misrepresentation (*Willard v Hagemeister* (1981) 121 CA3d 406, 416, 175 CR 365; see generally §9.19);
- Procedural requirements (see §§9.27-9.29);
- Statute of limitations (*Kitzig v Nordquist* (2000) 81 CA4th 1384, 97 CR2d 762 (complaint filed within 1 year of being told by dentist that there were problems with previous dentist's work); see Anno, 17 ALR6th 159 (2006) (when statute begins to run on dental malpractice); see §§9.71-9.76);
- Pleading in general terms (see *Blakeslee v Tannlund* (1938) 25 CA2d 32, 34, 76 P2d 216, 217; see generally §9.30);
- Sufficiency of proof (*Roberts v Parker* (1932) 121 CA 264, 269, 8 P2d 908, 910 (plaintiff may rely on inferences; conclusive proof not required); *Bowen v Ryan* (2008) 163 CA4th 916, 78 CR3d 128 (trial court erred in assault case against dentist in admitting other patient's descriptions of abuse at earlier times); see generally §9.31);
- Need for expert testimony (*Simone v Sabo, supra;* see *Evans v Ohanesian, supra;* see Annos, 18 ALR6th 325 (expert testimony to establish negligence in extracting tooth); 83 ALR2d 7, 78 (1962); see generally §9.32);
- Proof through defendant's admissions (*Myers v Ross* (1963) 216 CA2d 645, 650, 31 CR 110, 113; *Walter v England* (1933) 133 CA 676, 686, 24 P2d 930, 933; see generally §9.37);
- Common knowledge exception to expert testimony requirement (*Barham v Widing* (1930) 210 C 206, 216, 291 P 173, 176 (improper sterilization); *Myers v Ross, supra* (severance of nerve); *Walter v England* (1933) 133 CA 676, 685, 24 P2d 930, 931 (needle broke in gums); *Nelson v Painless Parker* (1930) 104 CA 770, 776, 286 P 1078, 1080 (tooth dropped into throat); but see *Surabian v Lorenz* (1964) 229 CA2d 462, 465, 40 CR 410, 411 (reaction to Novocain not matter of common knowledge); see generally §9.39); and
- Applicability of res ipsa loquitur (see *Blackwell v Hurst* (1996) 46 CA4th 939, 943, 54 CR2d 209 (dental crown fell down throat during fitting; see §1.37); *Ragin v Zimmerman* (1929) 206 C 723, 728, 276 P 107, 108 (X-ray burns); *Surabian v Lorenz, supra* (rarity of result alone does not support inference); *Carr v Dickey* (1958) 163

CA2d 416, 421, 329 P2d 539, 542 (extraction; elements not shown); see generally §§9.40-9.45).

For statutory definitions of unprofessional dental conduct, see Bus & P C §§1618.1, 1685. On a dentist's administration of "oral conscious sedation," see Bus & P C §§1647.10-1647.17.

See Annos, 7 ALR6th 357 (2006) (root canal procedures), 125 ALR5th 403 (2005) (extracting tooth without informed consent), 77 ALR4th 222 (1990) (liability in providing or fitting dentures), 11 ALR4th 748 (1982) (dentist's breach of contract to achieve particular result or cure), 3 ALR4th 318 (1981) (statute of limitations on dental malpractice). See §9.84 on "good Samaritan" immunity.

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§9.50 B. Osteopaths

Few differences remain between the schools of practice of osteopathic physicians and medical doctors. See Bus & P C §2275 (use of M.D. and D.O.). See also the Osteopathic Act, Deering's Bus & P C App II, West's Bus & P C §§3600-1-3600-5. Consequently, the principles applied to determine an osteopath's liability for malpractice are the same as those for physicians and surgeons. See *McCurdy v Hatfield* (1947) 30 C2d 492, 495, 183 P2d 269, 271 (standard of care); *Ingamells v Goodfellow* (1930) 109 CA 62, 66, 292 P 162, 164 (expert testimony requirement). See also *Burford v Baker* (1942) 53 CA2d 301, 306, 127 P2d 941, 943 (medical doctors testified on standards for osteopaths).

See Anno, 73 ALR4th 24 (1989) (osteopaths' medical malpractice liability). See generally §§9.1-9.48.

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§9.51 C. Chiropractors and Other Drugless Practitioners

A chiropractor or other drugless practitioner must possess the learning and skill of the ordinarily skillful practitioners of the same school and must use that skill and the ordinary care and prudence of practitioners in similar areas. *Abos v Martyn* (1939) 31 CA2d 705, 713, 88 P2d 797, 801; *Ellinwood v McCoy* (1935) 8 CA2d 590, 593, 47 P2d 796, 797; *Howe v McCoy* (1931) 113 CA 468, 472, 298 P 530, 531. See *Duprey v Shane* (1952) 39 C2d 781, 795, 249 P2d 8, 16 (doctor treating own employee caused new and further injury; workers' compensation not exclusive remedy; see California Workers' Damages Practice §4.59 (2d ed Cal CEB 2001)).

The propriety of treatment by such a practitioner is generally tested by the principles of his or her own school or system. See *Howe v McCoy* (1931) 113 CA 468, 471, 298 P 530, 531 (chiropractic testimony). Testimony of medical doctors is properly received, however, when the malpractice relates to general medical knowledge on a subject not peculiar to a particular school. *Abos v Martyn, supra* (manipulation improper treatment for tuberculosis); *Wallace v La Vine* (1940) 36 CA2d 450, 452, 97 P2d 879 (tight cast and diathermy for wrist fracture); *Ellinwood v McCoy* (1935) 8 CA2d 590, 594, 47 P2d 796, 797 (electrical, thermal, and ultraviolet treatment for gonorrhea); *Dalton v Los Angeles College of Chiropractic* (1932) 125 CA 196, 200, 13 P2d 546, 548 (burns from diathermy). See *Stanhope v Los Angeles College of Chiropractic* (1942) 54 CA2d 141, 143, 128 P2d 705, 706 (physician's testimony on accepted practice in X-ray diagnosis).

The standards applied to medical doctors also apply to a chiropractor who exceeds his or her license privileges in attempting medical treatment. *Brown v Guy* (1956) 144 CA2d 659, 666, 301 P2d 413, 417. See generally the Chiropractic Act, Deering's Bus & P C App I, West's Bus & P C §§1000-1-1000-19.

Neither chiropractic nor other expert testimony is necessary to establish negligence in nontechnical matters. *Morrison v Lane* (1935) 10 CA2d 634, 635, 52 P2d 530 (injury to healthy parts of body). The res ipsa loquitur presumption of negligence may also be invoked. *Hurn v Woods* (1982) 132 CA3d 896, 183 CR 495 (no expert testimony needed when treatment on upper back produced broken rib).

See Anno, 77 ALR4th 273 (1990) (chiropractors' and other drugless practitioners' medical malpractice liability).

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§9.52 D. Chiropodists or Podiatrists

"Chiropodist" and "podiatrist" are equivalent terms that refer to practitioners engaged in the diagnosis and treatment of foot diseases and disorders. See Bus & P C §2472. A chiropodist must use the degree of ordinary skill and care in the treatment of patients that is commonly exercised by other chiropodists in the same or a similar locality, and need not possess or exercise the care and skill of a medical doctor except when it is shown with respect to a particular treatment that the customary practice of chiropodists conforms to that of physicians. *Warren v Roos* (1954) 127 CA2d 224, 228, 273 P2d 569, 571. See *Wilson v Ritto* (2003) 105 CA4th 361, 129 CR2d 336 (podiatrist, found liable, failed to prove that subsequent treatment by orthopedist was negligent or contributed to patient's injury). See Anno, 80 ALR2d 1278 (1961) (standard of care).

A chiropodist is subject to liability on the ground of battery if the patient does not give informed consent to the treatment. *Pedesky v Bleiberg* (1967) 251 CA2d 119, 123, 59 CR 294, 297. See generally §§9.11-9.16.

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Source: Torts/California Tort Guide/9 Medical Malpractice/§9.53 E. Nurses

§9.53 E. Nurses

A nurse, even when performing a task that physicians sometimes perform (*e.g.,* fetal monitoring during labor) must exercise the reasonable degree of skill, knowledge, and care ordinarily possessed and exercised by nurses (not doctors) in similar circumstances. *Alef v Alta Bates Hosp.* (1992) 5 CA4th 208, 215, 6 CR2d 900 (doctor's testimony may be used to establish standard to which nurse should be held); *Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 172 CR 342 (nurses' failure to meet standard of postoperative care).

There is no category of "ordinary negligence" by a nurse toward a patient (separate from professional negligence) that would exempt the plaintiff from meeting procedural requirements imposed in professional negligence lawsuits (see §§9.27-9.30), if the plaintiff's injury occurred while in the nurse's care. *Flowers v Torrance Mem. Hosp. Med. Ctr.* (1994) 8 C4th 992, 35 CR2d 685 (left by nurse on gurney, patient fell to floor).

Although nurses are held to strict professional standards of knowledge and performance, a nurse can err in judgment, be unsuccessful in treatment, or select one of alternative approved methods, without being negligent. *Fraijo v Hartland Hosp.* (1979) 99 CA3d 331, 342, 160 CR 246 (no liability for giving drug ordered by doctor or for attempting to revive patient in acute distress without taking time to call doctor).

Expert testimony about nursing standards may be necessary in particular cases. See *McDonald v Foster Mem. Hosp.* (1959) 170 CA2d 85, 97, 338 P2d 607, 613, disapproved on other grounds at 57 C2d 839 (expert testimony essential to show symptoms of drug reaction). See also *Goff v Doctors Gen. Hosp.* (1958) 166 CA2d 314, 318, 333 P2d 29, 33 (physician's testimony on nurse's duties).

Instances in which nursing neglect can be inferred from common knowledge and experience include the following:

- Failure to notify physician of changes in patient's condition (*Gin Non Louie v Chinese Hosp. Ass'n* (1967) 249 CA2d 774, 787, 57 CR 906, 915 (postoperative mental state); *Mundt v Alta Bates Hosp.* (1963) 223 CA2d 413, 423, 35 CR 848, 854 (postoperative swelling of leg); see *Frantz v San Luis Med. Clinic* (1978) 81 CA3d 34, 39, 146 CR 146 (effect of injection given by nurse); *Cooper v National Motor Bearing Co.* (1955) 136 CA2d 229, 235, 288 P2d 581, 585 (slow-healing wound became cancerous); *Valentin v La Societe Francaise* (1946) 76 CA2d 1, 7, 172 P2d 359, 363 (signs of tetanus; expert testimony and common knowledge));
- Insufficient attendance on helpless or severely disabled patient (*Stevenson v Alta Bates, Inc.* (1937) 20 CA2d 303, 309, 66 P2d 1265, 1268 (partially paralyzed patient fell); see *Griffin v County of Colusa* (1941) 44 CA2d 915, 923, 113 P2d 270, 274 (delirious patient left unattended)); and
- Res ipsa loquitur situations, especially injuries to healthy parts of the body of an unconscious or semiconscious patient (*Ybarra v Spangard* (1944) 25 C2d 486, 494, 154 P2d 687, 690 (shoulder and neck injured during appendectomy); *Oldis v La Societe Francaise* (1955) 130 CA2d 461, 463, 279 P2d 184, 186 (severe burn to semiconscious patient during postoperative care); see *Leonard v Watsonville Community Hosp.* (1956) 47 C2d 509, 514, 519, 305 P2d 36, 39, 42 (clamp left in patient); *Rimmele v Northridge Hosp. Found.* (1975) 46 CA3d 123, 129, 120 CR 39 (spinal injury after injection)).

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§9.54 F. Pharmacists

The practice of pharmacy is, under Bus & P C §4050(b), "a dynamic patient-oriented health service … to improve and promote patient health by means of appropriate drug use, drug-related therapy, and communication for clinical and consultative purposes." A pharmacist must select, measure, and label prescribed medication in accordance with a doctor's orders; be alert to errors or problems and bring them to the doctor's attention; provide, under 16 Cal Code Regs §1707.2, oral consultation about prescription drugs to the patient or the patient's agent, which may include advice about proper use, possible side effects, and interaction with other drugs; and post a prescribed "notice to consumers." *Huggins v Longs Drug Stores, Inc.* (1993) 6 C4th 124, 132, 24 CR2d 587 (pharmacist indicated wrong dosage (five times amount prescribed) for infant on medicine purchased and administered by parents).

There is no material distinction, however, between the professional duties of pharmacists and the duties of other health care providers that would allow the parent of a child for whom a prescription is negligently filled to recover emotional distress damages as a direct victim, even if the pharmacist knows that the patient is an infant and that the parent will be administering the medication. *Huggins v Longs Drug Stores, Inc., supra*.

A pharmacist may be liable for disclosing, without a customer's consent, information about prescription drugs furnished to the customer. See *Wise v Thrifty Payless, Inc.* (2000) 83 CA4th 1296, 100 CR2d 437. Further, a pharmaceutical company and its salesperson can be liable for invading a doctor's patient's privacy, if the salesperson is present, without the patient's informed consent, during the doctor's physical examination of the patient. See *Sanchez-Scott v Alza Pharm.* (2001) 86 CA4th 365, 103 CR2d 410 (salesperson was present as part of "mentor program" between company and its health care provider customers).

See Annos, 109 ALR5th 397 (2003) (punitive damages for wrongful conduct in preparing or dispensing prescriptions), 79 ALR5th 409 (2000) (liability for failure to warn of potential drug interactions), 44 ALR5th 393 (1996) (liability of pharmacist who accurately fills prescription).

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§9.55 G. Blood Banks; Testing Laboratories

The professional care standard applicable to blood banks is to use the degree of care ordinarily used by other blood banks in similar circumstances. *Spann v Irwin Mem. Blood Ctrs.* (1995) 34 CA4th 644, 654, 40 CR2d 360 (failure to test blood for HIV at time when no other blood bank did so not negligence). See *N.N.V. v American Ass'n of Blood Banks* (1999) 75 CA4th 1358, 89 CR2d 885 (minor who contracted AIDS from transfusion failed to show breach of duty by blood bank or by nurse to whom parents expressed desire that family and friends provide blood).

Laboratories that perform tests for employers can be liable when a negligently performed test produces a result that harmfully affects the employment status of the person whose fluids were tested. See *Ishikawa v Delta Airlines, Inc.* (9th Cir 2003) 343 F3d 1129 (employee's firing based on false result of negligently performed drug test).

See Anno, 20 ALR4th 136 (1983) (liability for injury or death from blood transfusion).

See §11.36 on strict product liability for defective blood or tissue.

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§9.56 H. Emergency Medical Technicians; 911 Services

Emergency medical technicians (EMTs) and ambulance attendants may be held, like nurses (see §9.53), to a standard of care consistent with the training they receive. See *Hernandez v KWPH Enters.* (2004) 116 CA4th 170, 10 CR3d 137 (insufficient special relationship (see §1.23) between ambulance EMTs and mentally disturbed person they were transporting to impose on them a duty to prevent her from exiting ambulance and running into traffic).

EMTs are health care providers within the ambit of the Medical Injury Compensation Reform Act (MICRA) (see §9.80) and when sued for injury resulting from negligent operation of an ambulance may, under CC §3333.1, introduce evidence of collateral source payments received by the plaintiff (see §9.83). *Canister v Emergency Ambulance Serv., Inc.* (2008) 160 CA4th 388, 395, 72 CR3d 792 (police officer accompanying arrestee in back of ambulance alleged negligent driving and failure to tell him of availability of seatbelt).

Health & Safety Code §1799.107 provides a statutory immunity to public employees performing emergency rescue services, including "911 dispatchers," that supersedes general tort provisions in CC §1714., absent proof of gross negligence or bad faith. See *Eastburn v Regional Fire Protection Dist.* (2003) 31 C4th 1175, 7 CR3d 552.

See Annos, 16 ALR5th 605 (1993) (liability for negligence of ambulance attendants, EMTs, and others rendering emergency medical care outside hospital.

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III. HOSPITALS, SANITARIUMS, AND REST HOMES

A. Grounds for Professional Liability

§9.57 1. General Standard of Care

A hospital or similar institution must, for the safety and protection of its patients, use the degree of care, skill, and diligence generally used by hospitals in the community under the circumstances (including the patient's known condition), or required by an express or implied undertaking with the patient, including the employment of reasonably competent nurses and other personnel. *Rice v California Lutheran Hosp.* (1945) 27 C2d 296, 299, 163 P2d 860, 862 (private hospital); *Wood v Samaritan Inst.* (1945) 26 C2d 847, 851, 161 P2d 556, 558 (sanitarium). See *Contreras v St. Luke's Hosp.* (1978) 78 CA3d 919, 927, 144 CR 647 (rules similar to those for doctors); *Thomas v Seaside Mem. Hosp.* (1947) 80 CA2d 841, 847, 183 P2d 288, 292 (duty to infant). See Anno, 83 ALR3d 871 (1978) (rest home). But see *Moon v Guardian Postacute Servs., Inc.* (2002) 95 CA4th 1005, 116 CR2d 218 (patient's son-in-law could not recover damages for his own emotional distress based in alleged abuse of assisted-living-facility resident; see California Tort Damages §6.9 (2d ed Cal CEB 2002).

A hospital is not, however, an insurer of the patient's health or safety, and is not required to guard against events that a reasonable person would not anticipate. *DeMartini v Alexander Sanitarium, Inc.* (1961) 192 CA2d 442, 448, 13 CR 564, 567 (actions of mental patients); *Gray v Carter* (1950) 100 CA2d 642, 644, 224 P2d 28, 29 (fall of arthritic patient).

When the plaintiff's injury occurs while he or she is in the hospital for treatment, the patient's cause of action is for professional negligence; there is no separate category of "ordinary" hospital negligence toward a patient that would exempt the plaintiff from meeting requirements imposed in professional negligence lawsuits. *Flowers v Torrance Mem. Hosp. Med. Ctr.* (1994) 8 C4th 992, 35 CR2d 685 (patient left unattended on gurney fell to floor).

The intentional destruction of evidence by a hospital being sued for malpractice should be condemned, but penalties for such conduct lie within the malpractice suit; there is no separate tort cause of action for intentional spoliation of evidence when the alleged spoliation was by a party to the underlying action and the victim should have known of it before trial or a decision on the merits. *Cedars-Sinai Med. Ctr. v Superior Court* (1998) 18 C4th 1, 8, 74 CR2d 248 (mooting question whether complaint should have been dismissed for failure to comply with procedural provisions of CCP §425.13 relating to claims against health care providers for punitive damages; see §9.29). This restriction on recovery under a spoliation of evidence theory also applies to a person who is not a party in the underlying lawsuit. *Temple Community Hosp. v Superior Court* (1999) 20 C4th 464, 84 CR2d 852. See note in §1.2 on spoliation of evidence. See §1.12 on intentional breaches of duty.

A hospital's failure to locate a deceased patient's daughter, at the location the daughter had given 9 months earlier, before consigning the body to the county coroner for cremation did not entitle the daughter to recover emotional distress damages. See *Spates v Dameron Hosp. Ass'n* (2003) 114 CA4th 208, 7 CR3d 597 (Health & S C §7104 imposed no duty). Similarly, a hospital has no duty to find or notify relatives of a person in police custody who died while being treated for gunshot wounds. *Aguirre-Alvarez v Regents of Univ. of Cal.* (1998) 67 CA4th 1058, 79 CR2d 580.

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§9.58 2. Standard for Adult and Elder Abuse

The Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15705.40), particularly §15657, permits the recovery of both attorney fees and, in a wrongful death action, pain and suffering damages (up to $250,000) on clear and convincing evidence of physical or fiduciary abuse or "neglect," as defined in §15610.57, by a health care provider even though, under §15657.2, the Medical Injury Compensation Reform Act (MICRA) (see §9.85) otherwise applies to the suit. *Delaney v Baker* (1999) 20 C4th 23, 82 CR2d 610; *Conservatorship of Gregory* (2000) 80 CA4th 514, 95 CR2d 336 (recoverable attorney fees may include paralegal fees). See *Sababin v Superior Court (Covina Rehab. Ctr.)* (2006) 144 CA4th 81, 50 CR3d 266 (triable issues whether care facility's employees were guilty of reckless, oppressive, or malicious neglect for failing to follow care plan); *Intrieri v Superior Court (Ocadian Care Ctrs., Inc.)* (2004) 117 CA4th 72, 12 CR3d 97 (plaintiffs raised triable issues of fact on causes of action for elder abuse, negligent misrepresentation, and fraud); *Marron v Superior Court (Hassanien)* (2003) 108 CA4th 1049, 1064, 134 CR2d 358 (enhanced remedies under §15657 not punitive damages precluded by Govt C §818); *Norman v Life Care Ctrs. of Am.* (2003) 107 CA4th 1233, 132 CR2d 765 (evidence of EADACPA violation justified negligence per se (see §1.32) instruction).

Attorney fees are recoverable under Welf & I C §15657 only if plaintiff establishes by clear and convincing evidence that "neglect" attributable to the defendant caused a patient's injury or death. *Perlin v Fountain View Mgmt., Inc.* (2008) 163 CA4th 657, 77 CR3d 743. Further, the EADACPA does not provide for the recovery of attorney fees by a successful defendant. *Wood v Santa Monica Escrow Co.* (2007) 151 CA4th 1186, 60 CR3d 597.

NOTE: EADACPA provisions do not lessen a trial judge's discretion under Evid C §352 to exclude evidence the probative value of which is outweighed by its likely prejudicial effect. *Akers v Miller* (1998) 68 CA4th 1143, 1148, 80 CR2d 857 (photographs of bedsores). See §9.8 on a doctor's liability under the EADACPA, and §9.29 on the need to comply with CCP §425.13 when seeking punitive damages in an EADACPA suit. On immunity under Welf & I C §§15634 from civil liability for falsely reporting elder abuse, see *Easton v Sutter Coast Hosp.* (2000) 80 CA4th 485, 95 CR2d 316. Code of Civil Procedure §2031.1 states a policy of disfavoring "confidential settlement agreements" in EADACPA cases.

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§9.59 3. Duty to Furnish Competent Nurses, Physicians, and Other Personnel

A hospital can be liable when injury results from its negligent failure to provide a sufficient number of adequately trained and qualified personnel. See *Rice v California Lutheran Hosp.* (1945) 27 C2d 296, 299, 163 P2d 860; *Czubinsky v Doctors Hosp.* (1983) 139 CA3d 361, 367, 188 CR 685 (patient coming out of anesthesia suffered cardiac arrest after nurse, whose duties included helping anesthesiologist, had left room to assist surgeons beginning another operation); *Valentin v La Societe Francaise* (1946) 76 CA2d 1, 4, 172 P2d 359 (rule stated). See Anno, 2 ALR5th 286 (1992) (liability for failure to keep enough nurses on duty).

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§9.60 4. Hospitals' Respondeat Superior Liability

Apart from its duty to supply adequate, competent personnel (see §9.59), a hospital may be liable under respondeat superior principles for injury caused by the negligence of a doctor, nurse, or anyone else employed by the hospital. *Rice v California Lutheran Hosp.* (1945) 27 C2d 296, 303, 163 P2d 860 (employee left hot tea near feeble patient); *Wood v Samaritan Inst.* (1945) 26 C2d 847, 852, 161 P2d 556 (alcoholic left unwatched and unrestrained); *Meyer v McNutt Hosp.* (1916) 173 C 156, 159, 159 P 436 (patient burned by hot-water bottle).

A hospital is vicariously liable to a patient for an employee's *intentional tort,* however, only if the risk of the tort was "engendered by" or "arose out of" the employment or the hospital's enterprise. *Lisa M. v Henry Mayo Newhall Mem. Hosp.* (1995) 12 C4th 291, 298, 48 CR2d 510 (hospital not vicariously liable for technician's sexual molestation of patient, but could be liable for negligent hiring, training, or supervision); *Stone v Regents of Univ. of Cal.* (1999) 77 CA4th 736, 747, 92 CR2d 94 ("egg stealing" by doctors at fertility clinic not within scope of their employment; public entity employer not required to provide defense; see §8.8).

NOTE: Apparently synonymous with "engendered by the employment" are such terms as "an outgrowth of," "typical of or broadly incidental to," or "a generally foreseeable consequence of" the employment; "triggered off by [something] in the employment activity"; and "generated by or an outgrowth of workplace responsibilities, conditions or events."

A hospital is liable for injury caused by the negligence of a physician ostensibly employed by the hospital to perform professional services. *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 166, 41 CR 577, 584 (anesthesiologist); *Seneris v Haas* (1955) 45 C2d 811, 831, 291 P2d 915, 926 (anesthetist); *Mejia v Community Hosp. of San Bernardino* (2002) 99 CA4th 1448, 1458, 122 CR2d 233 (hospital liable for negligence of ostensible agent; here, no evidence that patient visiting emergency room should have known that radiologist was not hospital's agent); *Stanhope v Los Angeles College of Chiropractic* (1942) 54 CA2d 141, 146, 128 P2d 705, 709 (X-ray technician as ostensible agent). See *Jacoves v United Merchandising Corp.* (1992) 9 CA4th 88, 110, 11 CR2d 468 (triable issue of fact whether director of hospital's adolescent psychiatric unit was acting as hospital's agent in authorizing discharge of patient who later committed suicide). See Anno, 51 ALR4th 235 (1987).

Negligence of a private physician employed by the patient is not ordinarily imputed to the hospital. *Mayers v Litow* (1957) 154 CA2d 413, 417, 316 P2d 351, 354 (hospital privileges insufficient to show employment). On the other hand, a hospital can be liable under the theory of "corporate hospital liability" for negligently selecting, reviewing, or periodically evaluating a person to whom it grants staff privileges, even if that person is an independent contractor and not an employee, if injury results from the person's lack of competence, negligence, or tortious conduct. See *Elam v College Park Hosp.* (1982) 132 CA3d 332, 337, 183 CR 156 (hospital permitted podiatrist it knew was being sued for malpractice to perform additional operations). See also *Meier v Ross Gen. Hosp.* (1968) 69 C2d 420, 435, 71 CR 903 (physician acting in dual capacity); *England v Hospital of Good Samaritan* (1936) 16 CA2d 640, 644, 61 P2d 48, 50 (question for jury whether hospital was negligent in hiring unlicensed nurse). But see *McDonald v Foster Mem. Hosp.* (1959) 170 CA2d 85, 93, 95, 338 P2d 607, 611, 612, disapproved on other grounds at 57 C2d 839 (lack of California license by otherwise qualified nurse not legal cause of injury). See Anno, 12 ALR4th 57 (1982) (hospital's duty to review or supervise treatment given by doctor or to require consultation).

Merely employing a nurse does not make a hospital liable for injury resulting from the nurse's attending a friend (not a hospital patient) at the friend's home. *Hooks v Southern Cal. Permanente Med. Group* (1980) 107 CA3d 435, 165 CR 741 (no "special relationship" created).

The alleged negligence of a nurse employed by a residential care facility is imputed to the facility, but not to a private "regional center" that, under the Lanterman Developmental Disabilities Services Act (Welf & I C §§4500-4697) supervises such facilities. See *Morohoshi v Pacific Home* (2004) 34 C4th 482, 20 CR3d 890 (resident's death resulted from facility employee's negligent failure to check his blood sugar level; nondelegable duty concept does not impose duty on regional center).

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§9.61 5. Diligence in Attending Patient or in Calling Physician

In the absence of a special contract, a hospital is not required to provide constant bedside attention unless it knows or reasonably should know that the patient's mental or physical condition requires it. *DeMartini v Alexander Sanitarium, Inc.* (1961) 192 CA2d 442, 448, 13 CR 564 (mental patient jumped from wall); *McDonald v Foster Mem. Hosp.* (1959) 170 CA2d 85, 97, 338 P2d 607, 614, disapproved on other grounds at 57 C2d 839 (child fell out of bed during postoperative recovery); *Gray v Carter* (1950) 100 CA2d 642, 644, 224 P2d 28, 29 (aged, arthritic patient fell).

On the other hand, a hospital must exercise the reasonable care that the patient's known mental and physical condition requires, including safeguarding the patient from foreseeable dangers due to mental incapacity of which the hospital has knowledge or notice. *Vistica v Presbyterian Hosp.* (1967) 67 C2d 465, 469, 62 CR 577, 579 (suicide by mental patient); *Wood v Samaritan Inst.* (1945) 26 C2d 847, 851, 161 P2d 556, 558 (failure to restrain alcoholic). See *Klein v BIA Hotel Corp*. (1996) 41 CA4th 1133, 1140, 49 CR2d 60 (failure of "residential hotel facility for the elderly" to monitor health and well-being of resident who jumped or fell from roof; evidence of facility's failure to comply with state regulations). See also *Wiggins v Royale Convalescent Hosp.* (1984) 158 CA3d 914, 206 CR 2 (hospital responsible for elderly patient's fall from bed not liable to patient's wife for her emotional distress).

The duty of reasonably diligent attendance is also breached if a hospital nurse fails to inform the patient's physician of significant changes in the patient's condition. *Frantz v San Luis Med. Clinic* (1978) 81 CA3d 34, 40, 146 CR 146 (complaints following injection); *Gin Non Louie v Chinese Hosp. Ass'n* (1967) 249 CA2d 774, 788, 57 CR 906, 915 (extreme restlessness); *Goff v Doctors Gen. Hosp.* (1958) 166 CA2d 314, 318, 333 P2d 29, 32 (severe loss of blood by maternity patient).

See Annos, 46 ALR5th 821 (1997) (nursing home liability for failing to notify others about patient's condition); 37 ALR4th 200 (1985) (escaping patient), 36 ALR4th 117 (1985) (deranged patient's self-inflicted injury), 9 ALR4th 149 (1981) (falls from hospital beds), 25 ALR3d 1450 (1969) (injury caused by restraints), 70 ALR2d 377 (1960) (care of convalescing patient).

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§9.62 6. Duty to Provide Emergency Service and Care or Survival Services

A licensed health facility that operates an emergency department must provide emergency services and care to anyone for whom it is requested for any condition that threatens loss of life or serious injury or illness. Health & S C §1317; *Lowry v Henry Mayo Newhall Mem. Hosp.* (1986) 185 CA3d 188, 229 CR 620.

Neither the health care facility, its employees, nor any physician and surgeon, dentist, clinical psychologist, or podiatrist is liable in any action arising from a refusal to render emergency services if that refusal is based on the reasonable determination that (1) the person is not suffering from an emergency medical condition or (2) the health facility does not have the appropriate facilities or personnel available to render the services needed. Health & S C §1317(c). Immunity may also be claimed by members of a facility's cardiopulmonary "rescue team." Health & S C §1317(f)-(g).

A request for ongoing outpatient kidney dialysis is not considered a request for emergency services. See *Payton v Weaver* (1982) 131 CA3d 38, 45, 182 CR 225.

A patient may establish a hospital's liability under 42 USC §1395dd (the federal Emergency Medical Treatment and Active Labor Act (EMTALA), or "patient anti-dumping" statute) without having to prove that the hospital acted with an improper motive. *Roberts v Galen of Virginia, Inc.* (1999) 525 US 249, 142 L Ed 2d 648, 119 S Ct 685 (per curiam opinion; patient not stabilized). See *Arrington v Wong* (9th Cir 2001) 237 F3d 1066 (hospital not in diversionary status may be liable for diverting ambulance to more distant hospital). But a hospital that called in a county mental health department crisis worker to conduct a psychological screening of a patient before releasing him from its emergency room is not liable for the patient's suicide 2 days later. *Baker v Adventist Health, Inc.* (9th Cir 2001) 260 F3d 987 (statute does not require hospital to call in expert beyond its emergency room capabilities). See also *Bryant v Adventist Health Sys./W.* (9th Cir 2002) 289 F3d 1162, 1166 (EMTALA not enacted to establish federal medical malpractice cause of action or national standard of care; hospital not liable under EMTALA for negligently failing to detect or correctly diagnose; patient's or survivor's recourse is suit for professional negligence); *Jackson v East Bay Hosp.* (9th Cir 2001) 246 F3d 1248 (hospital not liable under EMTALA for releasing patient after failing to diagnose emergency condition, treating symptoms, and concluding patient was stabilized); *Eberhardt v City of Los Angeles* (9th Cir 1995) 62 F3d 1253 (EMTALA creates no private cause of action against doctor who released depressed patient). For more on the EMTALA, see §9.86. See Anno, 58 ALR5th 613 (1998) (liability for emergency room diagnosis and care).

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§9.63 7. Defective Equipment; Dangerous Conditions

A hospital can be liable for failing to provide suitable supplies, equipment, and facilities, commensurate with the requirements of the case, that are reasonably safe and adequate for use in patient care. *Welsh v Mercy Hosp.* (1944) 65 CA2d 473, 478, 151 P2d 17, 20 (injury in lowering bed); *Hedlund v Sutter Med. Serv. Co.* (1942) 51 CA2d 327, 339, 124 P2d 878, 885 (jury instruction). See *Emerick v Raleigh Hills Hosp.* (1982) 133 CA3d 575, 581, 184 CR 92 (standard of care applied to alcoholic rehabilitation hospital in facilities maintenance must take into account its patients' particular disabilities and conduct; patient who sat on sink injured when it broke).

See generally *Medical Device Liability Issues: A Human Factors Perspective*, 36 CAOC Forum No. 10, p 25 (Consumer Attorneys of California), Dec. 2006. See Annos, 38 ALR6th 399 (2008) (nondefective wheelchair), 9 ALR4th 149 (1981) (defective bed), 16 ALR3d 1237 (1967) (condition of premises), 14 ALR3d 1254 (1967) (defective equipment), 72 ALR2d 408 (1960) (heating device), 31 ALR2d 1118 (1953) (wheelchair).

A hospital is not strictly liable in tort for defects in equipment. *Silverhart v Mount Zion Hosp.* (1971) 20 CA3d 1022, 1028, 98 CR 187 (needle broke during surgery; hospital's primary function is to provide medical services, not products). See Annos, 34 ALR4th 532 (1984) (product liability: machinery used in treatment), 20 ALR4th 1179 (1983) (instrument breaking in course of surgery or treatment).

Cases involving manufacturer and supplier liability for injury resulting from defects in or malfunction of medical equipment and devices are covered in chap 11.

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§9.64 8. Other Injuries, Results, or Treatment

Actions against hospitals have also involved issues of liability for the following:

- Injury from blood transfusions (see *Mundt v Alta Bates Hosp.* (1963) 223 CA2d 413, 423, 35 CR 848, 854 (negligent intravenous infusion); *Sherman v Hartman* (1955) 137 CA2d 589, 601, 290 P2d 894, 901 (needle came out of vein); see also Health & S C §1606 (discussed in §11.36));
- Negligent handling of anesthetics, drugs, or medicines (see *Clark v Gibbons* (1967) 66 C2d 399, 406, 58 CR 125, 130 (anesthetic wore off during surgery); *Quintal v Laurel Grove Hosp.* (1964) 62 C2d 154, 166, 41 CR 577, 584 (cardiac arrest while anesthetic being administered); *Seneris v Haas* (1955) 45 C2d 811, 291 P2d 915 (spinal anesthetic caused paralysis); *Cavero v Franklin Gen. Benevolent Soc'y* (1950) 36 C2d 301, 308, 223 P2d 471, 475 (erratic and excessive administration of anesthetic); *Dierman v Providence Hosp.* (1947) 31 C2d 290, 188 P2d 12 (explosion of anesthetic); Annos, 31 ALR3d 1114 (1970) (anesthetics), 9 ALR3d 579 (1966) (drugs and medicines); but see *Dunlap v Marine* (1966) 242 CA2d 162, 176, 51 CR 158, 166 (no liability for cardiac arrest));
- Injury by X-ray (see *Costa v Regents of Univ. of Cal.* (1953) 116 CA2d 445, 254 P2d 85 (osteomyelitis caused by X-ray treatment); Anno, 41 ALR2d 329, 338, 368 (1955));
- Injury from heating devices (see *Timbrell v Suburban Hosp.* (1935) 4 C2d 68, 72, 47 P2d 737, 739 (burns from hot compresses or water bottle); *Oldis v La Societe Francaise* (1955) 130 CA2d 461, 471, 279 P2d 184, 191 (burn from unknown cause); Anno, 72 ALR2d 408 (1960));
- Improper or inadequate burn treatment (*Carrasco v Bankoff* (1963) 220 CA2d 230, 239, 33 CR 673, 678);
- Exposure to infection or contagion (see *Davis v Memorial Hosp.* (1962) 58 C2d 815, 817, 26 CR 633, 634 (enema tube caused abscess); *Derrick v Ontario Community Hosp.* (1975) 47 CA3d 145, 120 CR 566; *Kalmus v Cedars of Lebanon Hosp.* (1955) 132 CA2d 243, 248, 281 P2d 872, 875 (unsterile needle caused abscess); *Inderbitzen v Lane Hosp.* (1932) 124 CA 462, 467, 12 P2d 744, 747 (unsterile examination caused uterine infection); see also *Valentin v La Societe Francaise* (1946) 76 CA2d 1, 6, 172 P2d 359, 361 (failure to treat tetanus));
- Injury from foreign object left in patient (see *Bowers v Olch* (1953) 120 CA2d 108, 116, 260 P2d 997, 1002 (needle); see Anno, 10 ALR3d 9 (1966); but see *Landsberg v Kolodny* (1956) 145 CA2d 158, 161, 302 P2d 86, 88 (emergency as justification));
- Negligent diagnosis and care in emergency ward (see Anno, 72 ALR2d 396 (1960); but see *Morand v Seaside Mem. Hosp.* (1953) 121 CA2d 745, 264 P2d 96 (original accident caused injury));
- Injury from injections given by nurses (*Frantz v San Luis Med. Clinic* (1978) 81 CA3d 34, 146 CR 146 (sciatic nerve injury); *Rimmele v Northridge Hosp. Found.* (1975) 46 CA3d 123, 120 CR 39 (nephritis following injections in buttock));
- Injury to obstetric patients (see *Seneris v Haas, supra* (paralysis followed spinal anesthesia during childbirth); *Ragusano v Civic Ctr. Hosp. Found.* (1962) 199 CA2d 586, 594, 19 CR 118 (paralysis of leg caused by stirrups used in delivery); Anno, 37 ALR2d 1284 (1954));
- Negligent handling, transportation, or disposition of corpse (see Anno, 86 ALR5th 693 (2001)); and
- Injury caused by debt collection practices (see Health & S C §1285 (cause of action against health facility for detaining patient for nonpayment of bill); *Bundren v Superior Court* (1983) 145 CA3d 784, 193 CR 671).

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§9.65 B. Pleading Hospital Negligence; Preliminary Procedures

As in other malpractice actions, a complaint against a hospital may plead negligence in general terms without detailing the specific manner in which the injury occurred or the exact nature of the negligence. *Guilliams v Hollywood Hosp.* (1941) 18 C2d 97, 101, 114 P2d 1. See §9.30.

See §§9.27-9.29 on procedural requirements in suits against health care providers.

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C. Proving Negligence and Causation

§9.66 1. Need for Expert Testimony; Common Knowledge

Expert testimony may be essential or important in establishing a hospital's liability for the malpractice of an employee doctor (see §9.32) or nurse (see §9.53) or when technical matters of hospital standards or practice are in issue (see *Goff v Doctors Gen. Hosp.* (1958) 166 CA2d 314, 319, 333 P2d 29 (physician's testimony proper)). See Anno, 40 ALR3d 515 (1971).

The common knowledge exception (see §9.39) applies in suits against hospitals.

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§9.67 2. Res Ipsa Loquitur

The principles establishing the application of res ipsa loquitur in physician malpractice cases (see §§9.40-9.45) are equally applicable in actions against hospitals. See, *e.g., Sanchez v Bay Gen. Hosp.* (1981) 116 CA3d 776, 789, 172 CR 342 (directed verdict on liability when facts showing applicability are undisputed); *Frantz v San Luis Med. Clinic* (1978) 81 CA3d 34, 41, 146 CR 146 (instructions); *Contreras v St. Luke's Hosp.* (1978) 78 CA3d 919, 930, 144 CR 647 (no evidence to support doctrine's first element; see §9.40); *Rimmele v Northridge Hosp. Found.* (1975) 46 CA3d 123, 129, 120 CR 39 (instructions on first element); *Cline v Lund* (1973) 31 CA3d 755, 761, 107 CR 629 (conditional instruction). See also Anno, 9 ALR3d 1315 (1966).

Res ipsa loquitur applies when an unconscious patient suffers an unusual injury (see §9.43) or when an incompetent or mentally disturbed patient injures himself. See *Vistica v Presbyterian Hosp.* (1967) 67 C2d 465, 62 CR 577 (suicide of mental patient); *Gin Non Louie v Chinese Hosp. Ass'n* (1967) 249 CA2d 774, 792, 57 CR 906 (delirious patient fell out of bed); *McDonald v Foster Mem. Hosp.* (1959) 170 CA2d 85, 98, 338 P2d 607, disapproved on other grounds at 57 C2d 839 (medicated child fell out of bed). See also *DeMartini v Alexander Sanitarium, Inc.* (1961) 192 CA2d 442, 445, 13 CR 564 (applicability of doctrine is fact question); *Ericson v Peterson* (1953) 116 CA2d 106, 109, 253 P2d 99 (same, when mental condition is in dispute).

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Source: Torts/California Tort Guide/9 Medical Malpractice/§9.68 IV. HEALTH MAINTENANCE ORGANIZATIONS AND OTHERS

§9.68 IV. HEALTH MAINTENANCE ORGANIZATIONS AND OTHERS

Damages may be sought from a health maintenance organization or a health plan on allegations that the HMO or the plan wrongfully denied a patient coverage for needed care or referral to a specialist. *McCall v PacifiCare of Cal., Inc.* (2001) 25 C4th 412, 106 CR2d 271 (Medicare beneficiary enrolled in HMO alleged that primary physician, physician provider group, and HMO repeatedly refused to refer him to specialist for lung transplant; suit could proceed in state court without need to exhaust Medicare administrative remedies on showing that denial of benefits would cause injury not remediable by later payment of benefits; causes of action not inextricably entwined with Medicare Act included negligence, willful misconduct, fraud, negligent and intentional infliction of emotional distress, "*Randi W.* cause of action" (see §1.27), and violation of state statute). See CC §3428 on duties of health care service plans and managed care entities. Evidence that a health care plan unreasonably delayed referring a member to a specialist (after plan physicians, having failed to diagnose the patient's Lyme disease, had failed to prescribe helpful treatment), raised triable issues of fact as to whether the plan was responsible for the charges of a non-plan specialist the member found on his own. *Kotler v PacifiCare of Cal.* (2005) 126 CA4th 950, 24 CR3d 447 (plan member asserted breach of contract and breach of implied covenant of good faith and fair dealing).

A negligence claim can be pursued against a health insurance plan whose third party administrator denied a requested lung cancer treatment as "investigational" and failed to advise the member that he was entitled to an independent external review. *Mintz v Blue Cross of Cal.* (2009) 172 CA4th 1594, 92 CR3d 422 (notice of such review mandated by Health & S C §1371.25). But see *Watanabe v California Physicians' Serv.* (2009) 169 CA4th 56, 63, 86 CR3d 374 (Health & S C §1371.25 immunized health service plan from vicarious liability for acts or omissions of patient's health care provider; plan could delegate decisions to provider); *Berkeley v Dowds* (2007) 152 CA4th 518, 526, 61 CR3d 304 (surviving spouse failed to show that attending doctor was negligent and no authority that he could be liable for failure to use reasonable care in performing HMO's contractual obligations).

NOTE: The United States Supreme Court has ruled that claims against HMOs brought to remedy the denial of benefits under benefit plans regulated by the Employee Retirement Income Security Act of 1974 (ERISA) (29 USC §§1001-1461) are completely preempted by ERISA and thus removable from state to federal court. See *Aetna Health, Inc. v Davila* (2004) 542 US 200, 159 L Ed 2d 312, 124 S Ct 2488. The high court decision, reversing a federal court of appeals, may cast doubt on *Benitez v North Coast Women's Care Med. Group, Inc.* (2003) 106 CA4th 978, 131 CR2d 364, in which the court held that a state claim against a medical services provider for denying infertility services because of a patient's sexual orientation was not preempted by ERISA. But see *North Coast Women's Care Med. Group, Inc. v Superior Court* (2008) 44 C4th 1145, 81 CR3d 708, in which the California Supreme Court ruled that the constitutional right to freedom of religion did not exempt physicians from conforming their conduct to the antidiscrimination requirement in CC §51 (Unruh Civil Rights Act) to provide equal access to medical services irrespective of the patient's sexual orientation. See also *Bui v American Tel. & Tel., Inc.* (9th Cir 2002) 310 F3d 1143 (employer, and company employer retained to provide emergency medical advice and evacuation services, when sued for medical malpractice leading to employee's overseas death, cannot avoid liability by claiming ERISA preemption, except to extent claim based on ERISA administrative decisions or otherwise required construing ERISA plan).

A group medical practice that, following the filing of a medical malpractice lawsuit against two of its physicians, terminates a patient's care, requiring the health care plan with which it has contracted to transfer the patient to another provider can be liable for interference with contractual relations, negligent infliction of emotional distress, and breach of fiduciary duty. See *Scripps Clinic v Superior Court* (*Thompson)* (2003) 108 CA4th 917, 134 CR2d 101. A public entity HMO may claim governmental immunity from liability for alleged negligent credentialing of a doctor sued for malpractice. See *Inland Empire Health Plan v Superior Court (Santana)* (2003) 108 CA4th 588, 133 CR2d 735 (independent practice association not liable for negligent credentialing because not HMO).

For more on the liability of a health maintenance organization for the negligence of a member physician, see Anno,

51 ALR5th 271 (1997). On the liability of an HMO or insurer for injury arising from failure to authorize needed treatment, see Anno, 56 ALR5th 737 (1998). On the right of an HMO to require arbitration of such disputes, see §9.78.

Certain claims against an HMO are subject to arbitration clauses in the agreement although others are not. See *Broughton v Cigna Healthplans* (1999) 21 C4th 1066, 90 CR2d 334, and *Cruz v PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 133 CR2d 58, noted in §9.78.

On liability for negligently credentialing a physician, see Anno, 98 ALR5th 533 (2002).

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V. DEFENSES

§9.69 A. Absence of Doctor-Patient Relationship

A doctor or other health care provider can obtain an early dismissal from a malpractice lawsuit by establishing that there was not, between the provider and the injured person, a "physician-patient" (or similar) relationship based on an express or implied contract. See, *e.g., Armato v Baden* (1999) 71 CA4th 885, 894, 84 CR2d 294 (no basis for imposing liability on doctors who did not participate in plaintiff's treatment although they provided services as independent contractors to the medical group where plaintiff was treated and allowed the group to use their names); *Clarke v Hoek* (1985) 174 CA3d 208, 217, 219 CR 845 (doctor who served as proctor, to observe and evaluate surgeon who operated on patient in connection with the surgeon's application for medical staff privileges, was not patient's doctor and owed patient no professional duty of care); *Rainer v Grossman* (1973) 31 CA3d 539, 543, 107 CR 469 (physician who gave advice to treating doctor as part of teaching seminar not liable to patient). See also *Shin v Kong* (2000) 80 CA4th 498, 95 CR2d 304 (doctor alleged to have artificially inseminated wife with doctor's sperm owed no duty to her husband, who was not his patient); *Smith v Pust* (1993) 19 CA4th 263, 23 CR2d 364 (absence of relationship prevented husband from recovering from wife's therapist for destroying marriage by having affair with wife; criminal conversation claim not to be shoehorned into medical malpractice cause of action); *Barton v Owen* (1977) 71 CA3d 484, 490, 139 CR 494 (doctor who merely talked with patient's wife on telephone while "covering" for other doctor not liable). See Anno, 17 ALR4th 132 (1982) (what constitutes physician-patient relationship).

A doctor who is hired by an employer to examine a job applicant (*Felton v Schaeffer* (1991) 229 CA3d 229, 279 CR 713) or who is hired by an insurance company to evaluate a workers' compensation claimant (*Keene v Wiggins* (1977) 69 CA3d 308, 313, 138 CR 3) does not have a sufficient relationship with the examinee to be liable for failing to diagnose, or to tell the examinee of, a health- or life-threatening condition. Such a doctor may, however, be liable for any new bodily injury, or aggravation of an existing injury, caused by professional negligence in performing the examination. *Mero v Sadoff* (1995) 31 CA4th 1466, 37 CR2d 769. See *James v U.S.* (ND Cal 1980) 483 F Supp 581 (employer's liability for failure to tell job applicant of suspected tumor that appeared on X-ray film made during preemployment physical examination). See Annos, 10 ALR3d 1071 (1966) (physician's duties to person examined pursuant to contract with person's employer or insurer), 69 ALR2d 1213 (1966) (employer's liability for failing to inform employee of condition disclosed by employment examination).

For more on a doctor's liability for failing to use reasonable care in preparing medical-legal reports relating to a patient, see *Brousseau v Jarrett* (1977) 73 CA3d 864, 871, 141 CR 200 (plaintiff's right to added attorney fee for doctor's alleged failure to record objective prognosis).

See §9.21 on a doctor's liability for violating the privacy rights of a patient even in the absence of a physician-patient relationship that would support a traditional medical malpractice claim.

For discussion of a health care provider's workers' compensation exclusivity immunity from liability for injury to the provider's employee, see California Workers' Damages Practice §4.59 (2d ed Cal CEB 2001).

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§9.70 B. Patient's Contributory Fault; Assumption of Risk; Duty to Mitigate Damages

A patient's failure to use ordinary care to prevent his or her own harm, including negligent failure to follow a doctor's instructions or to obtain treatment, constitutes contributory negligence. *Carmichael v Reitz* (1971) 17 CA3d 958, 991, 95 CR 381 (patient knowingly used drug that had caused bad reactions); *Puffinbarger v Day* (1962) 207 CA2d 540, 546, 24 CR 533, 536 (parents of deceased 2-year-old girl failed to properly care for her during her illness). See §1.41 on effect of such comparative fault. See Annos, 108 ALR5th 385 (2003) (contributory negligence or assumption of risk as malpractice-action defense), 84 ALR5th 619 (2000) (patient's failure to follow instructions), 100 ALR3d 723 (1980) (patient's failure to return for examination or treatment).

The defendant has the burden of pleading and proving both that the patient was contributorily negligent and that plaintiff's negligence was a legal cause of the injury. *Maertins v Kaiser Found. Hosps.*(1958) 162 CA2d 661, 666, 328 P2d 494, 497; *Preston v Hubbell* (1948) 87 CA2d 53, 60, 196 P2d 113, 117 (failure to prove defense as pleaded). See *Cooper v National Motor Bearing Co.* (1955) 136 CA2d 229, 236, 288 P2d 581, 586 (jury could find patient not negligent in relying on company nurse's assurances that wound was healing); *Dodds v Stellar* (1946) 77 CA2d 411, 421, 175 P2d 607, 616 (jury could find patient not negligent in delaying amputation of finger). See also *Walsh v Caidin* (1991) 232 CA3d 159, 164, 283 CR 326 (damages recoverable by widow who authorized cremation of patient's remains not reducible through doctors' cross-claim for spoliation of evidence).

If there is no evidence that a patient's negligence contributed to causing the injury, it is error to give a contributory negligence instruction. *LeMons v Regents of Univ. of Cal.* (1978) 21 C3d 869, 874, 148 CR 355; *Barton v Owen* (1977) 71 CA3d 484, 506, 139 CR 494. It may also be error to instruct the jury on contributory negligence absent expert testimony that plaintiff was negligent. See *Bolen v Woo* (1979) 96 CA3d 944, 952, 158 CR 454 (error to give BAJI 6.28 —patient's duty to follow doctor's instructions—solely on basis of patient's failure to see doctor before next scheduled appointment). See CACI 517 (2003).

Patient conduct that might be characterized as assumption of risk is now almost certainly *secondary* assumption of risk, a type of contributory negligence. See discussion in §§1.43, 1.46. Further, a patient's consent to unnecessary surgery is not a defense to the doctor's negligence in advising the operation. *Valdez v Percy* (1950) 35 C2d 338, 342, 217 P2d 422, 425.

Under the comparative fault system (see §1.41), there may be little need to distinguish between a patient's failure to mitigate damages after incurring injury, and the patient's contributory negligence—conduct that contributes to incurring the injury. See discussion of *LeMons v Regents of Univ. of Cal., supra,* in §1.56.

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Source: Torts/California Tort Guide/9 Medical Malpractice/§9.71 C. Statute of Limitations

§9.71 C. Statute of Limitations

Under CCP §340.5, an adult's action against a health care provider for injury or death caused by professional negligence must be begun within the earlier of

- 3 years after the date of injury, or
- 1 year after the plaintiff discovers, or through the use of reasonable diligence should have discovered, the injury.

An action may be barred by either the 1-year or the 3-year period, and the "date of injury" that begins the running of the limitations period may be different for purposes of each period. See *Hills v Aronsohn* (1984) 152 CA3d 753, 759, 199 CR 816 (action barred by 3-year period, although it would have been timely under 1-year period). See §§9.73-9.74 for more on each period. At least the 1-year period is tolled under CCP §351 while the defendant is absent from the state. *Kaplan v Mamelak* (2008) 162 CA4th 637, 641, 75 CR3d 861 (plaintiff entitled to conduct discovery to ascertain length of doctor's absences).

NOTE: The replacement of the 1-year period in former CCP §340(3) by the 2-year period in CCP §335.1 (see §2.32) for actions for assault, battery, or wrongfully caused personal injury or death appears not to affect limitations periods for actions against health care providers for professional negligence.

The 3-year limit bars an adult's medical malpractice lawsuit even if the adult was incompetent throughout the period; CCP §340.5 supersedes CCP §352 in these lawsuits. *Fogarty v Superior Court* (1981) 117 CA3d 316, 172 CR 594. Conversely, insanity under CCP §352 tolls the running of the 1-year period in CCP §340.5. *Alcott Rehabilitation Hosp. v Superior Court* (Smith) (2001) 93 CA4th 94, 98, 112 CR2d 807 (disagreeing with contrary conclusion reached in *Bennett v Shahhal* (1999) 75 CA4th 384, 89 CR2d 272). See §9.75 on provisions applicable to actions for a minor's injury or death.

The provision in CCP §352.1 that an incarcerated person has a 2-year extension of time for filing suit on a cause of action that accrued during incarceration tolls the 1-year limit, but not the 3-year limit, in CCP §340.5. *Belton v Bowers Ambulance Serv.* (1999) 20 C4th 928, 931, 86 CR2d 107 (prisoner alleged that ambulance service caused him injury while transporting him from federal prison to hospital. The court disapproves the contrary holding in *Hollingsworth v Kofoed* (1996) 45 CA4th 423, 52 CR2d 808. A federal court has held that the 2-year tolling of CCP §352.1 may be applied retroactively to limit tolling to 2 years even if the cause of action accrued before the statute's January 1, 1995, operative date, before which there was no limit on the tolling of a prisoner's claim. See *Fink v Shedler* (9th Cir 1999) 192 F3d 911.

See §9.27 on the 90-day tolling of the statutory period when a notice of intention to sue is served on the doctor within 90 days before the date the period would otherwise expire.

A lawsuit against a doctor for battery (or for surgery performed without the patient's informed consent; see §9.16) is not governed by CCP §340.5 but, since January 1, 2003, by the limitation period specified in CCP §335.1 (2 years; see §2.32 on retroactivity). See *Brown v Bleiberg* (1982) 32 C3d 426, 431, 186 CR 228 (period does not begin to run until patient discovers, or should have discovered, the injury and its wrongful cause). On the other hand, a patient's action against a doctor for failure to inform (see §§9.11-9.15), is subject to CCP §340.5. *Hedlund v Superior Court* (1983) 34 C3d 695, 700, 194 CR 805. Further, a patient's suit against a hospital for injuries occasioned by a fall from an X-ray table concerns professional negligence and is governed by the provisions of §340.5, not by the period ordinarily applicable to personal injury (CCP §335.1, formerly §340(3)). *Bellamy v Appellate Dep't* (1996) 50 CA4th 797, 57 CR2d 894.

The CCP §340.5 limitations periods apply to actions filed on or after December 12, 1975. See *Tresemer v Barke* (1978) 86 CA3d 656, 663, 150 CR 384. However, they do not apply to an action for violation of the Elder Abuse and Dependent Adult Civil Protection Act (EADACPA) (Welf & I C §§15600-15766; see §9.57). *Benun v Superior Court (Country Villa East, L.P.)* (2004) 123 CA4th 113, 20 CR3d 26 (health care providers that commit custodial elder abuse subject to CCP §335.1 and tolling effect of CCP §352); *Guardian N. Bay, Inc. v Superior Court (Spencer)* (2001) 94 CA4th 963, 114 CR2d 748 (after felony conviction, CCP §340.3 applied).

The death of a doctor halts the running of CCP §340.5 limitations periods; the special timetable for probate claims and suits against estates then becomes operative. *Wells Fargo Bank v Superior Court* (1977) 74 CA3d 890, 896, 141 CR 836.

For discussion of the date of accrual of a medical malpractice cause of action brought under the Federal Tort Claims Act (see 28 USC §2401(b)), see *U.S. v Kubrick* (1979) 444 US 111, 62 L Ed 2d 259, 100 S Ct 352 (2-year statute begins to run when patient knows of injury and learns its cause, not when he later learns that cause may be actionable); *Marley v U.S.* (9th Cir 2009) 567 F3d 1030 (statute of limitations is jurisdictional; equitable estoppel does not extend period); *McGraw v U.S.* (9th Cir 2002) 281 F3d 997, rehearing denied (2002) 298 F3d 754 (no accrual before doctors told plaintiff about existence of preexisting condition).

A plaintiff who complies with the requirements of CCP §474 may substitute, after the statute of limitations would otherwise have run, the name of a new defendant for a "Doe" fictitiously named in a timely complaint. *Fuller v Tucker* (2000) 84 CA4th 1163, 101 CR2d 776 (patient knew anesthesiologist's identity but not facts giving rise to cause of action). The "relation back" does not apply, however, if the original complaint is dismissed and a new one filed after the period has run. See *Woo v Superior Court* (1999) 75 CA4th 169, 89 CR2d 20. See also §11.41 on relation back in a product liability case.

See Annos, 19 ALR6th 475 (2006) (effect of fraudulent or negligent concealment of patient's cause of action); 14 ALR6th 301 (2006) (medical malpractice statute of repose); 17 ALR6th 159 (2006) (when statute begins to run on dental malpractice); 14 ALR6th 301 (2006) (timeliness under medical malpractice statute of repose aside from fraudulent concealment of patient's cause of action), 5 ALR6th 133 (2005) (validity of medical malpractice statutes of repose).

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§9.72 1. Separate Trial of Statute of Limitations Defense

The trial court must grant any party's motion in a medical malpractice action to have a statute-of-limitations defense tried before the main action. Also, the court may make such an order on its own motion. CCP §597.5. See *County of Kern v Superior Court* (1978) 82 CA3d 396, 147 CR 248.

There may, but need not, be a separate trial of a claim that the plaintiff failed to comply with government-tort-liability claims filing requirements (see chap 8). See *County of Kern v Superior Court, supra*.

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§9.73 2. Three-Year Period: Date of Injury; Effect of Fraud, Concealment, or Object Left in Patient

The date of injury that begins the running of CCP §340.5's 3-year limitation for actions filed by an adult (see §9.71) is the date that appreciable harm is first manifested, which may be later than the date of the defendant's wrongful act or omission. *Bispo v Burton* (1978) 82 CA3d 824, 831, 147 CR 442 (date of injury was after date doctor last saw patient but before date of corrective surgery). See *Steingart v Oliver* (1988) 198 CA3d 406, 243 CR 678 (period begins to run when *damaging effect* of alleged malpractice becomes apparent); *Hills v Aronsohn* (1984) 152 CA3d 753, 759, 199 CR 816 (period begins to run when patient is aware of physical manifestations of injury). See also *Wells Fargo Bank v Superior Court* (1977) 74 CA3d 890, 899, 141 CR 836 (action for injuries incurred more than 4 years earlier was barred even though additional treatment was later given).

The action is barred 3 years after the date the damaging effect of the injury is known regardless of whether the plaintiff knew or should have known that it was negligently caused. See *Larcher v Wanless* (1976) 18 C3d 646, 655, 135 CR 75; *Garabet v Superior Court (Boghosian)* (2007) 151 CA4th 1538, 1545, 60 CR3d 800 (3-year period provides outer limit that terminates all malpractice liability and begins to run when patient is aware of physical manifestations of injury); *McNall v Summers* (1994) 25 CA4th 1300, 1307, 30 CR2d 914. If the cause of action is for a doctor's failure to inform a patient of the risks of a procedure (see §9.11), the 3-year period begins to run when a complication of the procedure that was not disclosed first manifests itself. *Warren v Schecter* (1997) 57 CA4th 1189, 1201, 67 CR2d 573 (surgeon failed to tell patient that osteoporosis followed proposed ulcer surgery in 38 percent of patients; period did not begin to run when a risk of surgery that had been disclosed manifested itself, but later when appreciable harm from bone disease became manifest).

The 3-year period can be viewed as setting an outside date by which a suit against a health care provider ordinarily must be filed; even when the provider is a public entity, compliance with Govt C §945.6 does not extend the period. *Roberts v County of Los Angeles* (2009) 175 CA4th 474, 96 CR3d 60. See also §8.57.

The 3-year period is tolled for the doctor's fraud or intentional concealment, or for the presence in the patient's person of a foreign body that has no therapeutic or diagnostic purpose or effect. CCP §340.5. See *Brown v Bleiberg* (1982) 32 C3d 426, 437, 186 CR 228 (doctor misrepresented nature of surgery to conceal patient's cause of action); *Donabedian v Manzer* (1986) 187 CA3d 1021, 232 CR 325 (tolling for intentional concealment in minor's action); *Osborne v County of Los Angeles* (1979) 91 CA3d 366, 154 CR 129 (cause of action against surgeons who negligently left screw in patient's hip did not accrue until other doctors learned 7 years later that it had caused problems over the years). See also *Trantafello v Medical Ctr.* (1986) 182 CA3d 315, 227 CR 84 (intentional concealment requires affirmative misrepresentation, not just failure to obtain informed consent by failing to inform patient that procedure was innovative and that substance used for bone implant was artificial); *Nelson v Gaunt* (1981) 125 CA3d 623, 632, 178 CR 167 (cause of action against doctor for fraudulent misrepresentation on safety of treatment governed by 3-year limitations period in CCP §338 rather than 1-year period in CCP §340.5).

Placing a substance in the patient as part of the planned treatment does not create a tolling of the 3-year statute under the foreign-body provision. *Hills v Aronsohn* (1984) 152 CA3d 753, 763, 199 CR 816 (patient began to experience soreness from silicone injected more than 3 years before suit was filed).

Decisions applying tolling under the law before the December 12, 1975, operative date of CCP §340.5 that may still contain applicable discussion include the following:

- On fraud or concealment, *Stafford v Shultz* (1954) 42 C2d 767, 775, 270 P2d 1, 6 (misrepresentations as to curability); *Blake v Wernette* (1976) 57 CA3d 656, 129 CR 426 (failure to disclose under former CCP §340.5); *Weinstock v Eissler* (1964) 224 CA2d 212, 227, 36 CR 537, 547; *Garlock v Cole* (1962) 199 CA2d 11, 15, 18 CR 393, 395 (misrepresentations that condition was temporary); *Bowman v McPheeters* (1947) 77 CA2d 795, 800, 176 P2d 745, 748 (concealment of extent of injury);
- On objects left in patient, *Huysman v Kirsch* (1936) 6 C2d 302, 312, 57 P2d 908, 912 (tube); *Bowers v Olch* (1953) 120 CA2d 108, 117, 260 P2d 997, 1002 (needle); *Pellett v Sonotone Corp.* (1942) 55 CA2d 158, 160, 130 P2d 181, 182 (plaster in ear); *Ehlen v Burrows* (1942) 51 CA2d 141, 145, 124 P2d 82, 84 (broken tooth

roots in jaw).

See also *Sanchez v South Hoover Hosp.* (1976) 18 C3d 93, 99, 132 CR 657 (fraud or concealment does not toll statute after plaintiff discovers, or should have discovered, cause of action).

The tolling of the 3-year period by giving a statutory notice of intention to sue within the 90 days before the date the period would otherwise expire is covered in §9.27.

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§9.74 3. One-Year Period: Date of Injury; Discovery of Cause of Action

The 1-year period applicable to adults' malpractice actions (see §9.71) begins to run when the patient suspects, or should suspect, that the injury was caused by wrongdoing, and that someone has done something wrong to him. *Jolly v Eli Lilly & Co.* (1988) 44 C3d 1103, 1110, 245 CR 658 (information of circumstances that would put reasonable person on inquiry; knowledge of specific facts not necessary). Under *Jolly,* the limitations period does not begin to run until the earlier of two dates: (1) when the plaintiff had actual suspicion that the injury was caused by wrongdoing or (2) when a reasonable person would have suspected the injury was caused by wrongdoing. *Kitzig v Nordquist* (2000) 81 CA4th 1384, 1391, 97 CR2d 762 (alleged dental malpractice claim—see §9.49—was timely). That is, the period begins to run on the date plaintiff discovers or should have discovered the injury and its negligent cause, which may be later than either the date of defendant's wrongful conduct or the date plaintiff realized that he or she had incurred an injury. *McOwen v Grossman* (2007) 153 CA4th 937, 947, 63 CR3d 615 (fact question whether plaintiff should have known sooner specific form of negligence (using ineffective test) on which doctor's liability could be based); *Artal v Allen* (2003) 111 CA4th 273, 3 CR3d 458 (patient's knowledge of negligent cause of throat injury experienced immediately after pelvic surgery came less than 1 year before suit filed); *Hills v Aronsohn* (1984) 152 CA3d 753, 759, 199 CR 816 (period does not begin to run until patient is reasonably aware of both physical manifestation and its negligent cause); *Tresemer v Barke* (1978) 86 CA3d 656, 664, 150 CR 384 (statute runs from "discovery of the malpractice," not discovery of the harm). See *Larcher v Wanless* (1976) 18 C3d 646, 659, 135 CR 75, 82 (in wrongful death action, time runs from date of death, not date of patient's discovery of injury). See also *Campanano v California Med. Ctr.* (1995) 38 CA4th 1322, 45 CR2d 606 (accrual date of cause of action for infliction of emotional distress); *Dujardin v Ventura County Gen. Hosp.* (1977) 69 CA3d 350, 355, 138 CR 20 (accrual date of cause of action for governmental claims requirement purposes).

The "injury" whose discovery begins the 1-year period includes both the actual physical injury and the negligent cause of that injury; the statute begins to run when the plaintiff, through reasonable diligence, should have discovered the injury; *i.e.,* the statute begins to run when the plaintiff has (1) notice or information of circumstances that would put a reasonable person on inquiry or (2) the opportunity to obtain knowledge from sources open to investigation. *Gutierrez v Mofid* (1985) 39 C3d 892, 896, 218 CR 313 (knowledge that triggers limitations period is of facts, not legal theories, that support reasonably founded suspicions of need for investigation and pursuit of remedies); *Zambrano v Dorough* (1986) 179 CA3d 169, 224 CR 323 (suit for loss of reproductive ability timely even though less significant gynecological problems became manifest more than a year before suit was filed).

Additional cases on discovery of the injury and on the basis for the cause of action include *New v Armour Pharm. Co*. (9th Cir 1995) 67 F3d 716 (1-year period in suit against manufacturer of blood coagulant by patient claiming that product gave him AIDS begins to run not when he first tested HIV-positive but when he first discovered decline in his health); *Unruh-Haxton v Regents of Univ. of Cal.* (2008) 162 CA4th 343, 76 CR3d 146 (media allegations that fertility clinic doctors were stealing genetic material from patients did not trigger 1-year limitations period); *Knowles v Superior Court (Labo)* (2004) 118 CA4th 1290, 13 CR3d 700 (survivors who suspected immediately after patient's death that medical malpractice had caused it, barred even though they did not suspect particular defendant until more than 1 year later); *Henry v Clifford* (1995) 32 CA4th 315, 38 CR2d 116 (sham claim of nondiscovery justified sanctions); *Kleefeld v Superior Court* (1994) 25 CA4th 1680, 31 CR2d 12 (statute not tolled during time patient sought and waited for chiropractic examiners' board action against doctor); *Dolan v Borelli* (1993) 13 CA4th 816, 16 CR2d 714 (cause of action accrued when patient saw attorney, not later when second surgery confirmed that first surgeon had failed to correct adhesions); *Graham v Hansen* (1982) 128 CA3d 965, 972, 180 CR 604 (patient knew that her esophagus had been perforated); *Christ v Lipsitz* (1979) 99 CA3d 894, 160 CR 498 (cause of action for negligent performance of vasectomy accrued when wife became pregnant, not when child was born); and *Burgon v Kaiser Found. Hosps*. (1979) 93 CA3d 813, 155 CR 763, disapproved on other grounds at 22 C4th 16 n4 (cause of action accrued when prescribing doctor told patient to discontinue using drug that had been causing patient's problems).

A doctor's assurances that the plaintiff's problems were the unavoidable consequence of a necessary operation may

toll the 1-year statute. See *Brown v Bleiberg* (1982) 32 C3d 426, 434, 186 CR 228 (plaintiff suffered continuing foot problems for 12 years after surgery). See also *Unjian v Berman* (1989) 208 CA3d 881, 256 CR 478 (fact that operation failed to produce expected results, or worsened condition, does not necessarily put patient on notice that it was negligently performed, especially if patient continues under doctor's care and inquires about cause of apparent injury and doctor provides explanation calculated to allay suspicion); *Kilburn v Pineda* (1982) 137 CA3d 1046, 187 CR 548 (period does not necessarily begin to run when, after back operation, patient feels more pain than doctor said she would, or doctor says that he should have fused the back, or patient discharges doctor). But see *Sanchez v South Hoover Hosp.* (1976) 18 C3d 93, 101, 132 CR 657, 663 (knowledge may be presumptive as well as actual; doctor's concealment or nondisclosure does not toll 1-year statute, although, while physician-patient relationship continues, patient need not use special diligence to ferret out negligent causes of condition); *Enfield v Hunt* (1984) 162 CA3d 302, 310, 208 CR 584 (patient must exercise due diligence within 1 year after being put on notice by pain and paralysis of need to protect his rights; statute began to run when patient knew he was dramatically worse after surgery, having been told before surgery that there was no chance he would be worse afterward).

Decisions on delayed discovery of injury under the law before the December 12, 1975, operative date of CCP §340.5 that may still contain applicable discussion include the following:

- On the wrongful act, *Myers v Stevenson* (1954) 125 CA2d 399, 402, 270 P2d 885, 887;
- On the existence of the injuries, *Stafford v Shultz* (1954) 42 C2d 767, 776, 270 P2d 1, 7; and
- On the defendant's negligence as the cause of the injuries, *Rawlings v Harris* (1968) 265 CA2d 452, 455, 71 CR 288, 290; *Garlock v Cole* (1962) 199 CA2d 11, 15, 18 CR 393, 395; *Hundley v St. Francis Hosp.* (1958) 161 CA2d 800, 806, 327 P2d 131, 135.

The tolling of the 1-year period by giving a statutory notice of intention to sue within the 90 days before the date the period would otherwise expire is covered in §9.27.

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§9.75 4. Minor's Actions

Under CCP §340.5, a medical malpractice action by a minor must be begun within 3 years *from the date of the alleged wrongful act*, or before the minor's eighth birthday, whichever provides the longer period. These limitations are tolled for minors "for any period during which parent or guardian and defendant's insurer or health care provider have committed fraud or collusion" in failing to bring an action on the minor's behalf. See *Tran v Fountain Valley Comm. Hosp.* (1997) 51 CA4th 1464, 60 CR2d 91 (when last day "prior" to minor's eighth birthday is a Sunday, suit may be filed next day). Suit against a doctor for injury alleged to have resulted from his or her failure to report suspected child abuse (see §9.3) is subject to the limitations provisions of CCP §340.5 rather than to the period specified in CCP §338(a) for violation of a statutorily created liability. *David M. v Beverly Hosp.* (2005) 131 CA4th 1272, 32 CR3d 649.

Despite the CCP §340.5 phrase italicized above, a minor may, like an adult (see §9.74), file a medical malpractice lawsuit within 3 years after the date of "injury" or within 1 year after the date of discovering the injury and its cause. *Torres v County of Los Angeles* (1989) 209 CA3d 325, 257 CR 211 (§340.5's provisions for minors would otherwise be unconstitutional; there is no rational basis for treating adults and minors differently in this respect). See *Photias v Doerfler* (1996) 45 CA4th 1014, 1021, 53 CR2d 202 (equal protection requires rules for minors to be no more restrictive than those for adults; date of injury is when patient's condition "has become evidenced in some significant fashion"); *Katz v Children's Hosp.* (9th Cir 1994) 28 F3d 1520, 1524. See also statements in *Young v Haines* (1986) 41 C3d 883, 897, 226 CR 547, and *Steketee v Lintz, Williams & Rothberg* (1985) 38 C3d 46, 54 n4, 210 CR 781 (minor 17 years old when alleged malpractice occurred has 3 years; not limited to 1 year after attaining majority). Before the 1975 amendment of CCP §340.5, the same basic rules applied to minors' and adults' actions. See, *e.g., Whitfield v Roth* (1974) 10 C3d 874, 885, 112 CR 540 (parents' knowledge establishes time of accrual of minor's cause of action).

A minor must initiate suit (or serve a notice of intention to sue; see §9.27) within 3 years of the date of manifestation of injury and this 3-year period is not extended by later discovery that the injury was caused by negligence. *Arredondo v Regents of Univ. of Cal.* (2005) 131 CA4th 614, 31 CR3d 800 (in this regard, minors' rights under CCP §340.5 are no greater than those of adults; see §9.73).

An action for a child's injury that occurred before or during birth must be filed before the child's sixth birthday, and tolling for minority or insanity (see CCP §352) does not apply. CCP §340.4 (operative Jan. 1, 1994).

NOTE: For cases applying pre-§340.4 law, see *Young v Haines* (1986) 41 C3d 883, 226 CR 547; *Donabedian v Manzer* (1986) 187 CA3d 1021, 232 CR 325; *Ferguson v Dragul* (1986) 187 CA3d 702, 232 CR 79.

The tolling of the 3-year period by giving a statutory notice of intention to sue within the 90 days before the date the period would otherwise expire is covered in §9.27.

See discussion of *Martell v Antelope Valley Hosp. Med. Ctr.* (1998) 67 CA4th 978, 79 CR2d 329, in §8.57 on the dismissal of a minor's medical malpractice lawsuit against a public entity for failure to bring suit within 6 months of filing claim.

See Anno, 71 ALR5th 307 (1999) (minority provisions in limitation statutes).

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§9.76 5. Actions Against Hospitals and Others

Code of Civil Procedure §340.5 provisions, discussed in §§9.71-9.75, apply to actions for injury or death for professional negligence against such "health care providers" as physicians and surgeons, dentists, osteopaths, chiropractors, chiropodists, and other licensed and certified persons, as well as hospitals, clinics, and other licensed medical facilities and their legal representatives. The term "health care providers" also includes a medical student lawfully practicing medicine under a statutory exception to licensing requirements. *Chosak v Alameda County Med. Ctr.* (2007) 153 CA4th 549, 63 CR3d 184 (optometry student sued more than 2 years after plaintiff should have discovered her injury). See *Prince v Sutter Health Cent.* (2008) 161 CA4th 971, 74 CR3d 750 (unlicensed social worker, registered with the Board of Behavioral Sciences and working toward licensure).

An action against a hospital for professional negligence is subject to CCP §340.5 limitations rules, while an action for "ordinary negligence" may be subject to CCP §335.1 (2 years; formerly CCP §340(3); see discussion in §2.23), although the dividing line between professional and ordinary negligence is a matter of dispute. Compare *Murillo v Good Samaritan Hosp.* (1979) 99 CA3d 50, 56, 160 CR 33 (failure of hospital personnel to put up rails on drugged patient's bed is professional negligence), with *Gopaul v Herrick Mem. Hosp.* (1974) 38 CA3d 1002, 113 CR 811 (failure to strap unattended patient to gurney was ordinary negligence, not malpractice; period not tolled by plaintiff's ignorance of cause of action).

NOTE: *Flowers v Torrance Mem. Hosp. Med. Ctr.* (1994) 8 C4th 992, 1002 n6, 35 CR2d 685, specifically declines to resolve the *Murillo/Gopaul* conflict, but seems to side with *Murillo.* See also *Bellamy v Appellate Dep't* (1996) 50 CA4th 797, 57 CR2d 894 (fall from X-ray table concerns professional negligence; §340.5 applies); *Gray v Reeves* (1977) 76 CA3d 567, 142 CR 716 (personal injury statute (now CCP §335.1, formerly §340(3)) bars late action against drug manufacturer while §340.5 bars late action against doctor who prescribed drug).

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§9.77 D. Exculpatory Agreements

Agreements, signed by the patient before treatment, purporting to release a hospital or physician from liability for negligence are invalid as against public policy. *Tunkl v Regents of Univ. of Cal.* (1963) 60 C2d 92, 101, 32 CR 33, 39 (hospital); *Belshaw v Feinstein* (1968) 258 CA2d 711, 726, 65 CR 788, 797 (physicians). See Anno, 6 ALR3d 704 (1966). See also CC §1668 (invalidity of contracts exempting from liability for fraud, willful injury, or willful or negligent violation of law).

See §1.54 for discussion of exculpatory agreements and preinjury releases as a form of express, or primary, assumption of risk.

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Source: Torts/California Tort Guide/9 Medical Malpractice/§9.78 E. Arbitration Agreements

§9.78 E. Arbitration Agreements

Medical care providers may require prospective patients to agree to adjudicate malpractice claims by arbitration rather than by lawsuit. *Madden v Kaiser Found. Hosps.* (1976) 17 C3d 699, 710, 131 CR 882 (state employee bound by agreement between employee organization and health benefit plan). Thus, a patient's agreement to arbitrate claims based on treatment "now and in the future," signed while receiving back treatment, requires arbitration of a claim based on alleged negligent treatment, 2 years later, of a shoulder injury. *Reigelsperger v Siller* (2007) 40 C4th 574, 53 CR3d 887.

On the other hand, a person who signs an arbitration agreement is not conclusively presumed to have agreed to arbitration and should be permitted to show coercion or absence of consent. *Ramirez v Superior Court* (1980) 103 CA3d 746, 163 CR 223 (Spanish-speaking mother hurriedly signed Spanish version of agreement specified by CCP §1295, which is discussed below).

Basic policy favors enforcement of arbitration agreements, but enforcement may be denied to a medical provider that is guilty of misfeasance in the performance of the agreement. *Engalla v Permanente Med. Group, Inc.* (1997) 15 C4th 951, 960, 64 CR2d 843 (provider alleged to have fraudulently induced plaintiff's employer's entry into arbitration agreement by misrepresenting the speed with which it would be conducted, to have delayed arbitration until after patient's death (perhaps to avoid liability for pain and suffering damages), and to have waived its right to compel arbitration).

A judge can deny a petition to compel arbitration when the agreement was between fewer than all plaintiffs or defendants. See *Birl v Heritage Care, LLC* (2009) 172 CA4th 1313, 91 CR3d 777 (two of three defendants and several causes of action not covered by agreement).

The arbitration agreement between a patient and an individual doctor is enforceable even if the patient was referred to the doctor by a medical benefit plan that had not complied with requirements in Health & S C §1363 for predisclosure of any plan requirement that disputes be arbitrated. *Hollister v Benzl* (1999) 71 CA4th 582, 585, 83 CR2d 903.

A person may be required to arbitrate, as provided in a health insurance plan, a claim for compensatory and punitive damages and attorney fees under the California Consumers Legal Remedies Act (CLRA) (CC §§1750-1784), alleging injury and loss caused by the plan's deceptive and misleading advertising of the quality of medical services the plan would provide and alleging that a mother received substandard prenatal care and was denied a medically necessary Caesarean delivery. *Broughton v Cigna Healthplans* (1999) 21 C4th 1066, 90 CR2d 334 (plaintiff's CLRA prayer for injunctive relief, which is not arbitrable, can be severed from the damages claim). See *Cruz v PacifiCare Health Sys., Inc.* (2003) 30 C4th 303, 133 CR2d 58 (inarbitrability of claims to enjoin unfair competition and misleading advertising).

The terms of the arbitration agreement determine whose rights are subject to arbitration. See *Zakarian v Bekov* (2002) 98 CA4th 316, 322, 119 CR2d 623 (whether engineer that serviced laser eye surgery equipment, as well as doctor defendants, was subject to arbitration agreement is arbitrable issue).

A health plan may be deemed to have waived a contractual right to have a dispute arbitrated when the plan institutes discovery proceedings in defending a plan member's lawsuit alleging injury from the plan's refusal to authorize needed treatment and testing. *Berman v Health Net* (2000) 80 CA4th 1359, 96 CR2d 295 (plaintiff sufficiently prejudiced by plan's conduct to support waiver). But see *Groom v Health Net* (2000) 82 CA4th 1189, 98 CR2d 836 (health plan's demurrers to patient's complaint did not, absent evidence of prejudice to patient, waive plan's contractual right to require claim to be arbitrated), which rejects dicta in *Berman* that demurring would also constitute waiver.

A clause in an arbitration agreement that either party may seek a trial de novo if the arbitration award exceeds $24,999.99 inequitably favors the doctor and is unenforceable. *Saika v Gold* (1996) 49 CA4th 1074, 56 CR2d 922 (patient entitled to court order confirming $325,000 award).

An arbitration agreement applicable to certain medical services continues in effect for later services only if there is a continuing physician-patient relationship. *Cochran v Rubens* (1996) 42 CA4th 481, 49 CR2d 672 (evidence showed that patient's "book account" closed after first visit, thus agreement signed then did not cover surgery 3 years later).

Code of Civil Procedure §1295 regulates the form and content of agreements to arbitrate medical malpractice claims;

its provisions are mandatory, and a purported agreement that does not conform to it is unenforceable. *Rosenfield v Superior Court* (1983) 143 CA3d 198, 191 CR 611.

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§9.79 1. Formal Requirements

The patient is not bound by an agreement that, in the circumstances in which it was signed, was an adhesion contract. See *Wheeler v St. Joseph Hosp.* (1976) 63 CA3d 345, 357, 133 CR 775 (hospital admission form). But see *Coon v Nicola* (1993) 17 CA4th 1225, 21 CR2d 846 (arbitration agreement not adhesion contract and can cover malpractice committed before agreement was signed). See discussion of adhesion contracts and unconscionability in *Engalla v Permanente Med. Group, Inc.* (1997) 15 C4th 951, 984, 64 CR2d 843. See also *Turner v Superior Court* (1998) 67 CA4th 1432, 80 CR2d 84 (patient did not make sufficient showing to justify order requiring health provider to pay cost of plaintiff's party arbitrator).

The health maintenance organization or similar plan that does not comply with disclosure provisions in Health & S C §1363.1 is not entitled to force to arbitration a patient seeking damages for the plan's alleged refusal to provide or pay for necessary treatment (see §9.68). See *Smith v PacifiCare Behavioral Health of Cal., Inc.* (2001) 93 CA4th 139, 113 CR2d 140. See also *Burks v Kaiser Found. Health Plan, Inc.* (2008) 160 CA4th 1021, 73 CR3d 257 (arbitration provision insufficiently prominently displayed); *Robertson v Health Net of Cal., Inc.* (2005) 132 CA4th 1419, 34 CR3d 547 (motion to compel arbitration denied for failure to comply with requirements of "prominent display … immediately before signature line"); *Imbler v PacifiCare of Cal., Inc.* (2002) 103 CA4th 567, 126 CR2d 715 (Health & S C §1363.1 not preempted by Federal Arbitration Act; defendant's arbitration agreement failed to comply with statute). But see *Clay v Permanente Med. Group, Inc.* (ND Cal 2007) 540 F Supp 2d 1101, 1106 (Health & S C §1363.1 requirements preempted by federal Medicare Act (42 USC §1395w-26(b)(3))); *Drissi v Kaiser Found. Hosps., Inc.* (ND Cal 2008) 543 F Supp 2d 1076, 1079 (same).

Arbitration with a skilled nursing facility is not compelled by an admission contract that does not clearly indicate that agreement to arbitration is not a precondition for medical treatment or for admission to the facility. Health & S C §1599.81; *Swayne v Torrance Care Ctr. West, Inc.* (2007) 157 CA4th 172, 68 CR3d 588.

Provisions in a health care plan master policy that permitted the providers to reject an arbitrator's award and to have the dispute resubmitted to a panel of physicians were adhesive, not binding on the patient, contrary to public policy, and severable from other provisions that required arbitration by a panel appointed in the usual way. See *Beynon v Garden Grove Med. Group* (1980) 100 CA3d 698, 161 CR 146 (award made by first panel confirmed on patient's petition).

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§9.80 2. Persons Bound by Agreement to Arbitrate

Under three circumstances, a patient's agreement to arbitrate a medical malpractice claim can bind a person who did not consent to the agreement: (1) an agent can bind a principal; (2) one spouse can bind the other; and (3) a parent can bind a minor child. *Buckner v Tamarin* (2002) 98 CA4th 140, 119 CR2d 489 (daughters not bound to arbitrate wrongful death claim). See *Bolanos v Khalantian* (1991) 231 CA3d 1586, 283 CR 209 (patient who signed arbitration agreement in doctor's office in order to receive treatment was bound by it, as was her husband (on his claim for emotional distress) and her subsequently born injured daughter). See also *Wilson v Kaiser Found. Hosps.* (1983) 141 CA3d 891, 190 CR 649 (child bound by arbitration provisions of comprehensive medical care agreement entered into by parents with respect to prenatal and postnatal injuries). But see *Warfield v Summerville Senior Living, Inc.* (2007) 158 CA4th 443, 69 CR3d 783 (husband's signature on arbitration agreement did not bind patient suing for elder abuse; no showing he was wife's ostensible agent or held power of attorney).

A deceased patient's agreement with a health care provider to arbitrate medical malpractice claims does not require either the patient's wife or adult children to arbitrate a wrongful death claim against the provider. *Rodriguez v Superior Court* (2009) 176 CA4th 1461, 98 CR3d 728 (8-year-old not bound by mother's agreement to arbitrate); *Ruiz v Podolsky* (2009) 175 CA4th 227, 95 CR3d 828 (recognizing split of authority among appellate courts; principles of equity and contract law outweigh policy favoring arbitration). See also *Fitzhugh v Granada Healthcare & Rehabilitation Ctr. LLC* (2007) 150 CA4th 469, 473, 58 CR3d 585 (decedent's husband and sons not bound by arbitration agreement signed by husband). But see *Herbert v Superior Court* (1985) 169 CA3d 718, 215 CR 477 (deceased patient's survivors can all be required to arbitrate a wrongful death claim even if some of them not bound by patient's agreement to arbitrate); *Hawkins v Superior Court* (1979) 89 CA3d 413, 152 CR 491 (husband's health plan application for listed family members prevented wife from suing for his death).

Conversely, children who signed an arbitration agreement to obtain admission of a comatose patient to a convalescent hospital are not prevented, absent evidence that they had authority from the patient to enter into the agreement, from later pursuing malpractice lawsuits either as representatives of the patient's estate or separately as wrongful death action survivors. *Pagarigan v Libby Care Ctr., Inc.* (2002) 99 CA4th 298, 120 CR2d 892 (being mother's next of kin does not, in itself, confer authority to commit to arbitration despite Health & S C §§1418.8, 1599.65, and 22 Cal Code Regs §72527, which involve authority to authorize treatment). See *Flores v Evergreen at San Diego, LLC* (2007) 148 CA4th 581, 55 CR3d 823 (husband's signing of arbitration agreements when admitting wife to skilled nursing facility, not having been appointed her agent, did not prevent her from suing); *Goliger v AMS Props., Inc.* (2004) 123 CA4th 374, 19 CR3d 819 (daughter who signed mother's admission form and separate arbitration agreements as "responsible party," but not as "agent," not required to arbitrate survival or wrongful death claims). But see *Hogan v Country Villa Health Servs.* (2007) 148 CA4th 259, 55 CR3d 450 (daughter, authorized by mother to make health care decisions for her, bound by admission form provisions to arbitrate elder abuse claim (see §9.57) against nursing home); *Garrison v Superior Court (Country Villa Belmont Heights Healthcenter)* (2005) 132 CA4th 253, 33 CR3d 350 (daughter who had authority under durable power of attorney to sign arbitration agreement barred from suing).

An unemancipated minor who engages a doctor to provide obstetrical services and who signs an arbitration agreement cannot disavow that agreement on grounds of minority; further, the agreement protects a second doctor called in by the first, and binds the father of the child whose stillbirth is the occasion for the medical malpractice claim. *Michaelis v Schori* (1993) 20 CA4th 133, 24 CR2d 380. A minor plaintiff who was unborn (indeed, not conceived) when his mother signed an arbitration agreement may be bound by it under CCP §1295. *Pietrelli v Peacock* (1993) 13 CA4th 943, 16 CR2d 688.

The spouse of a patient who, when seeking medical treatment, signed an arbitration agreement must submit a loss of consortium claim to arbitration. *Mormile v Sinclair* (1994) 21 CA4th 1508, 26 CR2d 725; *Gross v Recabaren* (1988) 206 CA3d 771, 253 CR 820. But see *Baker v Birnbaum* (1988) 202 CA3d 288, 248 CR 336 (husband not bound by arbitration agreement he did not sign that contained no reference to a spouse's claims).

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§9.81 3. Claims and Causes of Action Covered by Arbitration Agreements

An arbitration agreement that uses the statutory term "medical malpractice" (see CCP §1295) requires arbitration of claims based on intentional tort theories such as battery. *Herrera v Superior Court* (1984) 158 CA3d 255, 261, 204 CR 553. However, when the intentional tort occurs outside the rendition of medical services, *e.g.,* certain sexual assaults, arbitration may not be compelled. *Victoria v Superior Court* (1985) 40 C3d 734, 222 CR 1 ("adhesive-type" contract; highly unlikely that parties intended it to cover situation). See §9.17 on doctors' liability for sexual contact with patients.

An agreement to arbitrate "any dispute as to medical malpractice, that is as to whether any medical services rendered under this contract were unnecessary or unauthorized or were improperly, negligently, or incompetently rendered," requires arbitration of a claim alleging breach of fiduciary duty, violation of privacy rights, intentional interference with prospective economic advantage, and negligence on the basis of a physician's having told the patient's disability insurer that she was not disabled and was a fraud and a scam artist. *Titolo v Cano* (2007) 157 CA4th 310, 68 CR3d 616 (communication to disability insurer, at patient's request, regarding diagnosis and treatment was "rendering of medical services"; see §9.21).

A physician employee of a professional corporation is bound by an arbitration clause in a patient/corporation contract as a third party beneficiary. *Harris v Superior Court* (1986) 188 CA3d 475, 233 CR 186 (physician employed by a health plan provider could not refuse to participate in arbitration mandated by health plan agreement between provider and patient, even though physician did not sign agreement).

An arbitrator can award punitive damages and the plaintiff's attorney fees in addition to compensatory damages and future medical expense. *Baker v Sadick* (1984) 162 CA3d 618, 621, 208 CR 676 (patient alleged that surgeon performed unnecessary surgery, which was induced by fraud, and falsified patient's medical records, in addition to negligent surgery and postoperative care).

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§9.82 4. Procedural Aspects of Arbitration

The 5-year period for bringing a claim to arbitration is not tolled by disputes over the appointment of an arbitrator or over the arbitrator's fee; the court may be petitioned to resolve such disputes. *Burgess v Kaiser Found. Hosps.* (1993) 16 CA4th 1077, 20 CR2d 488. See *Dinong v Superior Court* (1981) 120 CA3d 300, 174 CR 590 (party's right to nominate nonneutral arbitrator); *Dickinson v Kaiser Found. Hosps.* (1980) 112 CA3d 952, 169 CR 493 (sharing costs of arbitration).

Pendency of arbitration proceedings stays the running of the 5-year dismissal period for a related lawsuit, and dismissal of that suit is not a ground for dismissing the arbitration proceeding; the two are independent remedies. *Brock v Kaiser Found. Hosp.* (1992) 10 CA4th 1790, 13 CR2d 678.

A discovery dispute involving a lawsuit defendant that is not a party to an arbitration requested by co-defendants must be submitted first to the arbitrator, and the nonparty (to the arbitration) is entitled to full judicial review of the arbitrator's discovery order. *Bergland v Arthroscopic & Laser Surgery Ctr. of San Diego, L.P.* (2008) 44 C4th 528, 79 CR3d 370 (suit against physicians who invoked arbitration clauses and surgery center that was not party to the arbitration).

An arbitration panel's award may be vacated when it is discovered that neither the neutral arbitrator nor the health care provider had disclosed that the arbitrator frequently served as a party arbitrator for the provider. *Kaiser Found. Hosp. v Superior Court* (1993) 19 CA4th 513, 23 CR2d 431. On a provider's alleged misfeasance in carrying out an arbitration, see *Engalla v Permanente Med. Group, Inc.* (1997) 15 C4th 951, 64 CR2d 843, discussed in §9.78.

See Anno, 24 ALR5th 1 (1994) (arbitration of medical malpractice claims).

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§9.83 F. Recovery From (or Release of) Initial Tortfeasor; Indemnity

When a tortiously inflicted injury leads a person to seek medical treatment, the initial wrongdoer is ordinarily liable for all consequences flowing from the original injuries, even harm or death caused by a doctor's or hospital's negligence in treating the injury. *Hastie v Handeland* (1969) 274 CA2d 599, 604, 79 CR 268, 271. The negligent physician or hospital is liable only for the additional injury or aggravation. *Sweet v Stutch* (1966) 240 CA2d 891, 892, 50 CR 9. The initial tortfeasor may, however, obtain indemnity from the medical defendant for the separate and identifiable damages resulting from the latter's tort. *Niles v City of San Rafael* (1974) 42 CA3d 230, 239, 116 CR 733; *Herrero v Atkinson* (1964) 227 CA2d 69, 75, 38 CR 490, 493. See *Maxwell v Powers* (1994) 22 CA4th 1596, 1606, 28 CR2d 62 (plaintiff entitled to instruction that first doctor was responsible for aggravation of injury resulting from subsequent doctor's malpractice). See CACI 3929 (2003), BAJI 14.66 (9th ed 2002).

The patient's recovery from or release of the initial tortfeasor does not bar an action for malpractice unless it is shown that the patient received full compensation for all damages. *Ash v Mortensen* (1944) 24 C2d 654, 658, 150 P2d 876, 878 (judgment); *Dickow v Cookinham* (1954) 123 CA2d 81, 87, 266 P2d 63, 66 (settlement). See CCP §877 (effect of release). See also Anno, 39 ALR3d 260 (1971).

Proposition 51 (CC §1431.2; see §1.69) has been held to permit the initial tortfeasor (including a doctor sued for malpractice) to introduce evidence of subsequent malpractice that worsened the original injury, and if the trier of fact allocates fault to the treating (or second) doctor, the initial tortfeasor's liability for noneconomic damages does not include the percentage allocated to the treating (or second) doctor. *Marina Emergency Med. Group v Superior Court* (2000) 84 CA4th 435, 100 CR2d 866 (reasoning that Proposition 51 changed rule that made initial tortfeasor liable for all plaintiff's damages but with right to indemnity from subsequent tortfeasor). On the other hand, a doctor sued for malpractice cannot obtain a fault allocation to a previous doctor for negligence that allegedly produced the condition the defendant was hired to correct. See *Kitzig v Nordquist* (2000) 81 CA4th 1384, 1400, 97 CR2d 762 (alleged dental malpractice claim—see §9.48; presumably, second doctor not liable for patient's initial injury—see §1.63). See generally §9.26. Further, Proposition 51 does not authorize assignment of a fault percentage to a second doctor whose efforts ameliorated harm resulting from the malpractice of a provider who treated the patient earlier, absent evidence of the second provider's medical malpractice. See *Wilson v Ritto* (2003) 105 CA4th 361, 129 CR2d 336 (podiatrist, found liable, failed to prove that subsequent treatment by orthopedist was negligent or contributed to patient's injury).

Comparative (equitable, partial) indemnity (see §1.62) is available among joint tortfeasor medical defendants. See *Klemme v Hoag Mem. Hosp. Presbyterian* (1980) 103 CA3d 640, 644, 163 CR 109 (concur rent tortfeasors, although jointly and severally liable for payment of entire judgment, and entitled to pursue comparative indemnity claims against each other, are not required to litigate those claims in action brought against them by injured patient). However, a previous judgment that a defendant was not at fault precludes an equitable indemnity recovery by a party that had settled with the plaintiff in the previous lawsuit before it reached judgment. *Children's Hosp. v Sedgwick* (1996) 45 CA4th 1780, 53 CR2d 725.

Medical defendants sued for malpractice can pursue equitable indemnity claims against each other. See *Long Beach Mem. Med. Ctr. v Superior Court (Connors)* (2009) 172 CA4th 865, 91 CR3d 494 (after plaintiffs settled with other defendants for $8 million, physician separately settled for $200,000, which was wholly disproportionate to physicians' share of liability and represented only 10 percent of policy limits).

The existence of an arbitration agreement between a health care provider and a patient does not compel the tortfeasors liable for the patient's original injury to arbitrate their indemnity claim against the provider whose medical negligence aggravated the original injury. *County of Contra Costa v Kaiser Found. Health Plan, Inc.* (1996) 47 CA4th 237, 54 CR2d 628.

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Source: Torts/California Tort Guide/9 Medical Malpractice/§9.84 G. Good Samaritan Statutes

§9.84 G. Good Samaritan Statutes

Under the basic standard (see §9.1), a physician who renders emergency care would be liable to the patient for failure to use that degree of care and skill that other physicians would have used in the circumstances. See *Colby v Schwartz* (1978) 78 CA3d 885, 890, 144 CR 624.

To encourage doctors and other health care providers to render emergency care, various "good Samaritan" statutes have been adopted. For example, Bus & P C §2395 exempts from liability for civil damages a physician who in good faith renders emergency care at the scene of an emergency, including, in a medical disaster, a hospital emergency room. See *Perkins v Howard* (1991) 232 CA3d 708, 283 CR 764 (summary judgment proper for surgeon called in to assist in middle of operation when original assistant surgeon became too ill to continue; defendant had no preexisting duty to assist in plaintiff's surgery); *McKenna v Cedars of Lebanon Hosp.* (1979) 93 CA3d 282, 285, 155 CR 631 (resident physician summoned by nurse to room of patient who had unexpected seizures and cardiac arrest).

Section 2395 would not normally protect a doctor who had a contractual obligation to treat the patient or who was treating the patient as part of the doctor's regular duties. See *Colby v Schwartz, supra* (exemption does not protect doctor who treats emergency patient in hospital as part of normal course of doctor's practice; but see subsequently enacted Health & S C §1799.110, discussed in §9.35 and noted below). However, the statute does protect a doctor who responds to an emergency and treats a patient the doctor has no preexisting duty to treat. *Burciaga v St. John's Hosp.* (1986) 187 CA3d 710, 232 CR 75.

The test for application of Bus & P C §2395 is objective: whether the facts establish the existence of an exigency of so pressing a character that some kind of action must be taken. *Kearns v Superior Court* (1988) 204 CA3d 1325, 1328, 252 CR 4. The doctor who, responding to a request from another licensee for a second opinion about whether to admit a patient to a hospital, comes upon a medical emergency is protected by Bus & P C §§2395, 2396 without any need to show a subjective good faith belief that he was responding to a medical emergency when he went to the scene. *Reynoso v Newman* (2005) 126 CA4th 494, 24 CR3d 5. But see *Bryant v Bakshandeh* (1991) 226 CA3d 1241, 1247, 277 CR 379 (doctor's reasonable good faith belief that emergency exists must be considered by trier of fact).

The good Samaritan statutes may continue to protect doctors after the initial emergency intervention has ended. See *Breazeal v Henry Mayo Newhall Mem. Hosp.* (1991) 234 CA3d 1329, 286 CR 207 (child saved from immediate death died after his condition was diagnosed as "stable" and doctors told parents emergency was past).

Other good Samaritan provisions include the following:

- Bus & P C §2397 (former Bus & P C §2144.3) (emergency arose from failure to inform patient of possible consequences of treatment);
- Bus & P C §2396 (former Bus & P C §2144.5) (treatment for medical complication created by another doctor; see *Casteneda v Bornstein* (1995) 36 CA4th 1818, 43 CR2d 10, disapproved on other grounds at 20 C4th 149); and
- Health & S C §1799.110 (former Health & S C §1768) (services provided in general acute care hospital emergency department; see §9.35).

Health care providers and persons other than physicians may be covered by specific statutes. See, *e.g.*,

- Bus & P C §§1627.5, 1627.7 (dentist);
- Bus & P C §2727.5 (nurse);
- Bus & P C §2861.5 (vocational nurse);
- CC §1714.2 (person who renders emergency cardiopulmonary resuscitation);
- Govt C §50086 (person giving first aid at officer's request);
- Harb & N C §656 (vessel operator);
- Health & S C §128145 (former Health & S C §429.74) (certain trainees and supervisors in health manpower projects);
- Health & S C §1317 (health facility rescue team);
- Health & S C §1799.100 (sponsors and supervisors of emergency medical personnel training; see *Duckett v*

Pistoresi Ambulance Servs. (1993) 19 CA4th 1525, 24 CR2d 304 (immunity when trainee injured in vehicle collision);

- Health & S C §1799.105 (certain poison control centers);
- Health & S C §1799.106 (former Health & S C §1769) (firefighter, law enforcement officer, paramedic);
- Health & S C §1799.107 (public entities and emergency rescue personnel, public and private firefighters; see §§8.7, 9.56);
- Pen C §11172(a) (person reporting child abuse); and
- Welf & I C §5278 (persons detaining a mentally disoriented or gravely disabled person for treatment and evaluation); see *Cruze v National Psychiatric Servs., Inc.* (2003) 105 CA4th 48, 129 CR2d 65 (immunity for hospitals as well as to individuals); *Heater v Southwood Psychiatric Ctr.* (1996) 42 CA4th 1068, 49 CR2d 880 (battery for administering tranquilizer without consent); but see *Gonzalez v Paradise Valley Hosp.* (2003) 111 CA4th 735, 740, 3 CR3d 903 (no immunity for negligence during 72-hour hold); *Jacobs v Grossmont Hosp.* (2003) 108 CA4th 69, 77, 133 CR2d 9 (immunity for initiating and maintaining detention; no immunity for negligent or wrongful conduct in evaluation or treatment during confinement); see also Note in §9.10.

Physicians and others rendering aid to injured high school or college athletes are liable only for gross negligence. See Bus & P C §§2395, 2398 (former Bus & P C §2144); Ed C §49409.

Health & S C §1799.102 provides immunity to anyone who in good faith renders emergency medical or nonmedical care at the scene of an emergency..

Other statutes that provide for immunity from suit, or reduced liability, include CC §§43.9 (liability arising from multiphasic-unit referrals) and 43.95 (referral services).

Under Prob C §4740, a health care provider may be immune from liability for declining a family's request to withhold treatment from a terminally ill patient. See also *Duarte v Chino Community Hosp.* (1999) 72 CA4th 849, 853, 85 CR2d 521 (family sued for providers' refusal to remove woman with severe head injury from respirator or to transfer her to facility that would).

See Anno, 68 ALR4th 294 (1989) (good Samaritan statutes).

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§9.85 VI. MEDICAL INJURY COMPENSATION REFORM ACT (MICRA)

The Medical Injury Compensation Reform Act (MICRA) imposes several restrictions on the filing of medical malpractice lawsuits (see §§9.27-9.29) and on general damages, attorney fees, the collateral source rule, and lump-sum judgments. See §§9.86-9.89.

MICRA restrictions appear not to apply to federal tort lawsuits alleging violation civil rights under 42 USC §1983. See *Ellis v City of San Diego* (9th Cir 1999) 176 F3d 1183 (allegations that nurse sedated patient and drew blood and urine samples without his permission after his arrest).

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§9.86 A. Ceiling on Noneconomic Damages

Civil Code §3333.2 limits "noneconomic" damages in medical malpractice cases to $250,000. See *Hoffman v U.S.* (9th Cir 1985) 767 F2d 1431 (provision is constitutional); *Fein v Permanente Med. Group* (1985) 38 C3d 137, 211 CR 368 (same); *Francies v Kapla* (2005) 127 CA4th 1381, 26 CR3d 501 (medical malpractice damages are computed under CC §1431.2 (Proposition 51; see §1.69) before CC §3333.2 is applied to cap noneconomic damages; unpublished portion of opinion on doctor's liability for revealing confidential patient information noted in §9.21). See also *Gilman v Beverly Cal. Corp.* (1991) 231 CA3d 121, 283 CR 17 (when several defendants liable, noneconomic damages are first reduced to $250,000, then each defendant pays own percentage share of that sum). See §9.89 on the application of ceiling to periodic payments of future damages. See Anno, 26 ALR5th 245 (1995) (state laws limiting medical malpractice recoveries).

The limit on noneconomic damages can be asserted by 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.

The *Gilman* formula for reducing damages recoverable from a nonsettling defendant in a medical malpractice case may have the effect of reducing the plaintiff's recovery below the amount of his or her CCP §998 settlement offer, thus precluding the recovery of enhanced costs and interest. *Mayes v Bryan* (2006) 139 CA4th 1075, 44 CR3d 14 (no error in trial judge's calculation).

The $250,000 limit applies to all medical malpractice actions, including wrongful death actions, and applies regardless of the number of heirs. *Yates v Pollock* (1987) 194 CA3d 195, 239 CR 383. Further, the limit applies to damages recovered under the "antidumping" provisions of the federal Emergency Medical Treatment and Active Labor Act (EMTALA) (42 USC §1395dd), at least damages recovered for a claim "based on professional negligence." See *Barris v County of Los Angeles* (1999) 20 C4th 101, 110, 83 CR2d 145 (failure to stabilize claim). But see *Romar v Fresno Community Hosp. & Med. Ctr.* (ED Cal 2008) 583 F Supp 2d 1179 (MICRA provisions not applicable to EMTALA claim alleging disparate screening).

The damages ceiling does not apply, however, to a medical procedure that amounts to a common law battery (see §9.16) that is "something more than a 'technical battery.'" *Perry v Shaw* (2001) 88 CA4th 658, 106 CR2d 70 (surgeon alleged to have obtained patient's consent to perform previously rejected breast enlargement procedure only after she had been medicated and taken to operating room).

An entity, although not itself a "health care provider," as defined in CC §3333.2(c)(1), can assert the $250,000 limit when it is exposed to vicarious liability for the medical negligence of its employees. *Lathrop v Healthcare Partners Med. Group* (2004) 114 CA4th 1412, 8 CR3d 668 (medical group that was partnership of physicians). Otherwise, a person or entity that is not a health care provider, so defined, may not benefit from the ceiling. See *Kotler v Alma Lodge* (1998) 63 CA4th 1381, 74 CR2d 721 (residential care facility for mentally ill adults, not licensed as clinic, health dispensary, or health facility). See generally *Claims Outside MICRA Against Medical Groups in Light of* Lathrop v. Healthcare Partners, 34 CAOC Forum No. 10, p9 (Consumer Attorneys of California), Dec. 2004.

The $250,000 limit applies separately to a spouse's claim for loss of consortium. In other words, when a spouse seeks to recover for loss of consortium caused by medical malpractice, each spouse can recover up to $250,000 for his or her separate noneconomic losses. *Atkins v Strayhorn* (1990) 223 CA3d 1380, 273 CR 231. See also *Baker v Sadick* (1984) 162 CA3d 618, 626, 208 CR 676 (trial court reduced compensatory damage award to $250,000 plus award for future medical expense, plaintiff's attorney fees, and $300,000 punitive damages; latter not subject to CC §3333.2 restriction).

A health care provider may invoke the $250,000 ceiling to limit its comparative indemnity liability to other tortfeasors. *Western Steamship Lines v San Pedro Peninsula Hosp.* (1994) 8 C4th 100, 32 CR2d 263.

For further discussion of the $250,000 restriction, see California Tort Damages §§15.42-15.47 (2d ed Cal CEB 2002).

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§9.87 B. Restrictions on Plaintiff's Attorney Fees

Business and Professions Code §6146 restricts the contingency fee that a plaintiff's attorney may receive in a medical malpractice action to specified percentages of amounts recovered. See *Roa v Lodi Med. Group, Inc.* (1985) 37 C3d 920, 211 CR 77 (statute is constitutional).

Even if the client consents to a larger attorney fee award, the statute prohibits it. *Fineberg v Harney & Moore* (1989) 207 CA3d 1049, 255 CR 299; *Hathaway v Baldwin Park Community Hosp.* (1986) 186 CA3d 1247, 231 CR 334. The client cannot waive the restriction and may sue to recoup the excess retained by the attorney. *Schultz v Harney* (1994) 27 CA4th 1611, 33 CR2d 276.

In a wrongful death case, the fee limit applies to the total recovery, not to the separate recoveries of individual heirs. *Yates v Law Offices of Samuel Shore* (1991) 229 CA3d 583, 280 CR 316.

For purposes of fixing a plaintiff's attorney fee when the judgment provides for periodic payments of future damages (see §9.89), the court may base the fee on the jury's finding of the present value of future damages. See *Holt v Regents of Univ. of Cal.* (1999) 73 CA4th 871, 883, 86 CR2d 752. See also *Padilla v Greater El Monte Community Hosp.* (2005) 129 CA4th 667, 28 CR3d 636 (permissible attorney fee, although based on jury's erroneous computation of present value of future medical expense, not recomputable 2 years after judgment; see §9.89). But see *Nguyen v Los Angeles County Harbor/UCLA Med. Ctr.* (1995) 40 CA4th 1433, 48 CR2d 301 ("total value" of periodic payments is present value of periodic payments multiplied by number of years remaining in plaintiff's life expectancy, and, in this case, trial court could not amend final judgment to alter schedule of payments so that attorney could be paid immediately).

The attorney for a plaintiff whose claim against a health care provider may be based on a theory other than professional negligence may, with the client's informed consent, proceed against the defendant on the nonmalpractice theory and obtain a contingency fee in excess of the statutory limits. See *Waters v Bourhis* (1985) 40 C3d 424, 437, 220 CR 666 (whether client knowingly consented to fee in excess of limits is question of fact). See *Ojeda v Sharp Cabrillo Hosp.* (1992) 8 CA4th 1, 10 CR2d 230 (contingency fee agreement with medical-legal consulting firm hired to assist plaintiff's attorney must be closely scrutinized by court to ensure that it does not subvert statute).

The Medical Injury Compensation Reform Act (MICRA) (see §9.85) does not provide for an award of attorney fees to the prevailing party. See *Salgado v County of Los Angeles* (1998) 19 C4th 629, 651, 80 CR2d 46 (ordinary rule, that each party bears cost of own attorney, applies).

See Annos, 12 ALR5th 1 (1993) (defining "health care providers"), 88 ALR4th 358 (1991) (nonpatient claims excluded from statutory coverage), 12 ALR4th 23 (1982) (validity of statutory limitations on attorney fees in medical malpractice cases).

For further discussion of the attorney fee restriction, see California Tort Damages §§15.56-15.57 (2d ed Cal CEB 2002).

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§9.88 C. Collateral Source Payments

Civil Code §3333.1 permits a defendant to introduce evidence of collateral source payments made to or for the plaintiff and prevents the payor from obtaining reimbursement from the defendant. *Barme v Wood* (1984) 37 C3d 174, 207 CR 816 (statute is constitutional). See also *Canister v Emergency Ambulance Serv., Inc.* (2008) 160 CA4th 388, 395, 72 CR3d 792 (emergency medical technician (EMT) as health care provider who can introduce collateral source evidence (see §9.56)); *Miller v Sciaroni* (1985) 172 CA3d 306, 218 CR 219 (statute bars employer from obtaining reimbursement for workers' compensation benefits); *Brown v Stewart* (1982) 129 CA3d 331, 181 CR 112 (§3333.1 does not prohibit imposition of a Medi-Cal lien).

Section 3333.1 does not, however, preclude an injured person's heir, in a survival action, when all of injured person's medical expenses were paid by Medicare and Medi-Cal, from recovering damages from defendants for their medical malpractice; the jury may consider the collateral source payments to be but part of the damages awardable for medical expense and the recovery in the survival may be subject to a Medi-Cal lien. See *Hernandez v California Hosp. Med. Ctr.* (2000) 78 CA4th 498, 93 CR2d 97. See also *Cox v Superior Court* (2002) 98 CA4th 670, 120 CR2d 45 (evidence of taxability of collateral source payments properly excluded).

See Anno, 74 ALR4th 32 (1990) (statutes abrogating collateral source rule).

For further discussion of the collateral source restriction, see California Tort Damages §§15.48-15.49 (2d ed Cal CEB 2002).

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§9.89 D. Periodic Payment of Future Damages

Code of Civil Procedure §667.7 authorizes the court to order the periodic payment of certain damages in medical malpractice cases. *American Bank & Trust Co. v Community Hosp.* (1984) 36 C3d 359, 204 CR 671 (statute is constitutional). See also *Nguyen v Los Angeles County Harbor/UCLA Med. Ctr.* (1995) 40 CA4th 1433, 48 CR2d 301 (noted in §9.87); *Hrimnak v Watkins* (1995) 38 CA4th 964, 45 CR2d 514 (correlating future payments with expected future losses); *Schiernbeck v Haight* (1992) 7 CA4th 869, 9 CR2d 716 (interest on future payments should not have been awarded); *Craven v Crout* (1985) 163 CA3d 779, 782, 209 CR 649 (periodic payments cannot be ordered under CCP §667.7 after lump-sum judgment has been entered, except under CCP §473 relief).

For economic damages, when either party invokes CCP §667.7, the proper approach is for the jury to determine the gross amount of future damages and for the court to structure a periodic payment schedule based on that amount; it would be improper to structure a periodic payment schedule on the present value of future loss. *Salgado v County of Los Angeles* (1998) 19 C4th 629, 639, 80 CR2d 46 (trial court should not substitute own present value finding for jury's, but could fashion periodic payment schedule to reflect jury finding that future economic loss may be greater in early years and less in later years); *Holt v Regents of Univ. of Cal.* (1999) 73 CA4th 871, 876, 86 CR2d 752 (trial court's plan must provide for total payout of accrued and future damages equal to gross award, less statutory attorney fees, nonrecoverable costs, and valid liens against judgment; satisfaction of judgment is achieved by paying present value, not by funding periodic payments). A jury error in basing a present value computation for future medical expense on a table for a stream of constant payments, rather than on one for a series of rising payments, as had been awarded, could not (at least for the purpose of justifying a higher attorney fee) be corrected 2 years after entry of judgment. See *Padilla v Greater El Monte Community Hosp.* (2005) 129 CA4th 667, 28 CR3d 636 (also noted in §9.87).

For noneconomic damages, a trial judge may not first reduce the jury's finding of the present value of the noneconomic damages that the plaintiff will suffer over time to the $250,000 cap specified by CC §3333.2 (see §9.86), then require the defendant only to furnish an annuity that will pay that $250,000 over the plaintiff's projected life span; the $250,000 cap sets a limit only on the amount of the present payment that the defendant must make. See *Salgado v County of Los Angeles* (1998) 19 C4th 629, 645, 80 CR2d 46 (same rule applies to jury's finding of present value of future medical expenses).

The amount of an appeal bond to be posted when appealing from a judgment that included CCP §667.7 periodic payments is based on the lump-sum present value of the judgment amount. *Leung v Verdugo Hills Hosp.* (2008) 168 CA4th 205, 85 CR3d 203 (present value of about $14.8 million).

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10

Premises Liability

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I. INTRODUCTION

§10.1 A. Scope of Chapter

This chapter covers the liability of private owners of real property for injuries to persons on that property and adjacent property. The closely related liability of street vendors is discussed in §10.42. Rules relating to condominium developments are covered in §10.34.

See also

- §2.17 (air carriers' liability for the condition of airport premises);
- chap 6 (liability for injuries to workers and others at construction sites); and
- chap 8 (public entity liability for injuries on public property).

This chapter does not cover the following:

- Conditions that damage or lower the value of adjacent property (see, *e.g., Sprecher v Adamson Cos.* (1981) 30 C3d 358, 178 CR 783 (liability for landslide condition that pushed home into neighbor's home);
- Nuisance-type actions for activities that cause injury or threatened injury to nearby property or persons on it (see, *e.g., Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 25 CR2d 550 (nearby residents' fear of cancer from toxic waste dumped at landfill);
- Liability to property owners for use by trespassers (see, *e.g., Bailey v Outdoor Media Group* (2007) 155 CA4th 778, 66 CR3d 322 (lessee of advertising space did not remove sign after lease expired and new lease could not be negotiated; damages limited to net proceeds obtained from use);
- Liability of former owners, tenants, or real estate brokers for injury or damage after transfer of property (see, *e.g., Preston v Goldman* (1986) 42 C3d 108, 227 CR 817 (injury caused by patent defect); and
- Injury claims against casinos and resorts that assert tribal sovereign immunity as a defense (see, *e.g., Lawrence v Barona Valley Ranch Resort & Casino* (2007) 153 CA4th 1364, 64 CR3d 23.

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§10.2 B. Liability for Furnishing Alcoholic Beverages

Business & Professions Code §25602(b)-(c) and CC §1714(b) limit the liability of anyone who furnishes alcoholic drinks to a business or social visitor for injury that results from the drinker's later conduct. Because most such injuries involve the drinker's use of a motor vehicle, the present status of the law on a bar keeper's or social host's liability is covered in §4.63. Note that Bus & P C §15602.1 imposes liability on a person who "causes to be sold" any alcoholic beverage to an obviously intoxicated minor. Under *Hernandez v Modesto Portuguese Pentecost Ass'n* (1995) 40 CA4th 1274, 1281, 48 CR2d 229, this liability does not extend to the lessor of property used for the sale of alcohol.

Despite these statutes, the proprietor of a place where liquor is served still owes a duty of reasonable care to protect patrons from injuries caused by the reasonably foreseeable criminal or tortious conduct of other persons on the premises. See *Cantwell v Peppermill, Inc.* (1994) 25 CA4th 1797, 1801, 31 CR2d 246 (plaintiff assaulted and stabbed by another patron); *Saatzer v Smith* (1981) 122 CA3d 512, 518, 176 CR 68 (question whether defendant's employees acted promptly to stop fight). See generally §§10.6-10.11.

Further, the statutes may not have abrogated liability for furnishing a type or quantity of alcoholic drink that poisons the drinker. See *Ewing v Cloverleaf Bowl* (1978) 20 C3d 389, 143 CR 13 (serving large quantity of 151-proof rum to 21-year-old customer as willful misconduct).

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II. OWNERS' LIABILITY TO VISITORS

§10.3 A. Ordinary Care Standard (*Rowland v Christian*)

The owner of real property is liable for failing to use ordinary care and skill in the management of his or her person and property to avoid injuring persons on or near it; the test is whether the owner acted as a reasonable person in view of the probability of injury to others. *Rowland v Christian* (1968) 69 C2d 108, 119, 70 CR 97, 104 (applying CC §1714(a); see generally §1.4); *Portillo v Aiassa* (1994) 27 CA4th 1128, 1133, 32 CR2d 755 (invitee hurt by commercial lessee's dog). See §10.30 on a landlord's liability to a tenant.

NOTE: Before the 1968 decision in *Rowland v Christian, supra,* the extent of an owner's duty to a visitor was determined by whether the latter had the status of invitee, licensee, or trespasser. See §10.4.

Unless otherwise noted, in this chapter "owner" includes the lessees, occupiers, possessors, and others whose control of the property subjects them to an owner's liability, and "visitor" includes invitees (business and social), licensees, and trespassers.

The legislature and the courts have created several exceptions to the general rule that a property owner is liable for injury resulting from a failure to use ordinary care and skill, including the following:

- Furnishers of alcoholic beverages (see §10.2);
- Firefighters, peace officers, and emergency medical personnel (see §§10.19-10.23);
- Recreational users (see §§10.24-10.28); and
- Trespassers on railroad locomotives and cars (CC §1714.7, enacted to abrogate the result in *Beard v Atchison, T. & S.F. Ry.* (1970) 4 CA3d 129, 84 CR 449 (injury to trespassing minor)).

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§10.4 B. Effect of Visitor's Status

A visitor's status on the property—as a trespasser, a licensee, or an invitee—no longer establishes the extent of the owner's duties to the visitor, although status may be relevant to the specific nature or scope of those duties or to the foreseeability that the visitor might be harmed. *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 674, 25 CR2d 137; *Rowland v Christian* (1968) 69 C2d 108, 119, 70 CR 97, 104; *Hassoon v Shamieh* (2001) 89 CA4th 1191, 1195, 107 CR2d 658, partially disapproved at 36 C4th 244 (see Note in §10.7; not reasonably foreseeable to store owner that customer would be hit in drive-by shooting); *Alva v Cook* (1975) 49 CA3d 899, 906, 123 CR 166. See also §10.3.

NOTE: Pre-*Rowland* cases may also provide guidance on the substantive duties of landowners to visitors. See *Williams v Carl Karcher Enters.* (1986) 182 CA3d 479, 486, 227 CR 465, disapproved on other grounds at 8 C4th 580; *Beauchamp v Los Gatos Golf Course* (1969) 273 CA2d 20, 27, 77 CR 914, 919.

Generally, and insofar as the terms are still used:

- An "invitee" is someone invited or permitted to enter or remain on premises for a purpose related to the owner's (or their mutual) business or advantage (*Popejoy v Hannon* (1951) 37 C2d 159, 167, 231 P2d 484, 490 (gratuitous work by forklift operator); *Crane v Smith* (1943) 23 C2d 288, 297, 144 P2d 356, 361 (store patron's child); *Weinstein v St. Mary's Med. Ctr.* (1997) 58 CA4th 1223, 68 CR2d 461 (employee injured in fall on employer's premises while being treated by employer for prior work-related injury may recover damages under dual capacity exception to workers' compensation exclusivity); *Speece v Browne* (1964) 229 CA2d 487, 491, 40 CR 384, 387 (father invited to come and prepare dinner); *Perez v Ow* (1962) 200 CA2d 559, 560, 19 CR 372, 373 (market patron); see *O'Keefe v South End Rowing Club* (1966) 64 C2d 729, 737, 51 CR 534, 538 ("invitee" includes both business visitor and public invitee; see Restatement (Second) of Torts §332 (1965)); *Clawson v Stockton Golf & Country Club* (1963) 220 CA2d 886, 896, 34 CR 184, 190 (necessity of invitation));
- A "licensee" is someone permitted to enter or remain on premises for purely social purposes or for his own or some third person's pleasure or benefit (*Bylling v Edwards* (1961) 193 CA2d 736, 739, 14 CR 760, 762 (social guest)); and
- A "trespasser" is anyone who enters or remains on the premises without the owner's consent or a privilege to do so (*Boucher v American Bridge Co.* (1950) 95 CA2d 659, 668, 213 P2d 537, 543 (subcontractor's employee went to another part of building); *Demmer v City of Eureka* (1947) 78 CA2d 708, 711, 178 P2d 472, 474 (child paddled floating log over defendant's flooded premises).

See Anno, 22 ALR4th 294 (1983) (current status of invitee, licensee, trespasser rules).

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§10.5 C. Owner's Conduct; Active Operations

An owner who conducts active operations on the premises must exercise ordinary care for the safety of everyone he knows, or should expect, to be on the property. This was true even before 1968 (see §10.3), regardless of the status of the injured person. See *Oettinger v Stewart* (1944) 24 C2d 133, 138, 148 P2d 19, 22 (invitee); *Staggs v Atchison, T. & S.F. Ry.* (1955) 135 CA2d 492, 500, 287 P2d 817, 821 (trespasser or licensee); *Tesone v Reiman* (1953) 117 CA2d 211, 214, 255 P2d 48, 49 (licensee or invitee). See also *Nigro v West Foods* (1963) 218 CA2d 567, 574, 32 CR 692, 696 (invitee contributorily negligent).

Not every affirmative course of conduct, however, gives rise to liability. See *Rotolo v San Jose Sports & Entertainment, LLC* (2007) 151 CA4th 307, 324, 59 CR3d 770 (choosing to have defibrillator at its sports facility did not impose duty on owners to tell every facility user of its availability).

See Anno, 64 ALR5th 205 (1998) (liability for spilling food or beverage on customer).

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D. Owner's Liability for Others' Conduct

§10.6 1. Owner's Underlying Duty

In certain situations, an owner must act affirmatively to protect visitors and employees from the wrongful conduct of other visitors. See *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 674, 25 CR2d 137 (others' criminal acts; see §10.7); *Robison v Six Flags Theme Parks, Inc.* (1998) 64 CA4th 1294, 75 CR2d 838 (another's negligent acts; see also §10.12). For example, a business premises owner has a duty to protect invitees from (a) visitors' negligent conduct that threatens their safety if the owner has reasonable cause to anticipate or foresee such negligence and the probability of resulting injury and (b) the intentional conduct of visitors who are known to be on the premises. *Taylor v Centennial Bowl, Inc.* (1966) 65 C2d 114, 121, 52 CR 561 (one tavern patron attacked another). See *Kentucky Fried Chicken v Superior Court* (1997) 14 C4th 814, 822, 59 CR2d 756 (rule acknowledged: business establishment proprietor who has reasonable cause to anticipate them owes duty of care to business invitees to take affirmative action to control the wrongful acts of third persons). See also *Edwards v Hollywood Canteen* (1946) 27 C2d 802, 810, 167 P2d 729, 722 (professional dancer injured by intoxicated partner); *Weidenfeller v Star & Garter* (1991) 1 CA4th 1, 2 CR2d 14 (bar patron assaulted in parking lot; bar owner held 20 percent at fault); *Musgrove v Ambrose Props.* (1978) 87 CA3d 44, 51, 150 CR 722 (shopping center patron struck by boy riding bicycle); *Barker v Wah Low* (1971) 19 CA3d 710, 711, 721, 97 CR 85 (patron at take-out window hit by car that jumped parking lot bumper). But see *Garcia v Paramount Citrus Ass'n, Inc.* (2008) 164 CA4th 1448, 80 CR3d 512 (owner of private farm road had no duty to post warning of approaching intersection with public road; collision caused by negligence of nonemployee using road as shortcut); *Lackner v North* (2006) 135 CA4th 1188, 1202, 37 CR3d 863 (permitting high school snowboard team to practice on its slopes and hosting competition did not impose on ski resort owner any duty to skier hit by snowboarder; also noted in §§1.4, 1.46); *Cody F. v Falletti* (2001) 92 CA4th 1232, 1236, 112 CR2d 593 (subdivision association not liable to boy injured by dogs kept by owner of property adjacent to road over which association had easement; see §3.18); *Jefferson v Qwik Korner Mkt.* (1994) 28 CA4th 990, 995, 34 CR2d 171 (customers in parking area); *Martin v Barclay Distrib. Co.* (1970) 13 CA3d 828, 832, 91 CR 817 (restaurant patron pushed into door in crowded foyer). See generally Restatement (Second) of Torts §344 (1965).

Courts have been reluctant to conclude that the *criminal* acts of a third person were foreseeable absent circumstances such as prior similar criminal acts. See *Wiener v Southcoast Childcare Ctrs., Inc.* (2004) 32 C4th 1138, 1150, 12 CR3d 615 (child care center proprietors had no duty to foresee that vehicle driver bent on killing and injuring children would intentionally drive through weak chain-link fence into playground; *Ann M.* (see above) balancing test applied); *Rinehart v Boys & Girls Club* (2005) 133 CA4th 419, 34 CR3d 677 (rock throwing by club members on playground and by nonmembers on nearby hill were not sufficiently similar incidents to require club to foresee the need to take protective and supervisory measures to protect member on playground from being hit by rock thrown from the hill by nonmember; see also §10.10).

See §10.2 on liability of tavern keeper, and §10.30 on landlord's liability for injuries to tenants or guests.

A security firm employed by the owner may be liable for the conduct of others on the premises. See *Mukthar v Latin Am. Sec. Serv.* (2006) 139 CA4th 284, 289, 42 CR3d 563 (under negligent undertaking doctrine (see §1.8), question of fact whether security service's failure to furnish guard increased risk of harm to store clerk hit by customer); *Marois v Royal Investigation & Patrol, Inc.* (1984) 162 CA3d 193, 200, 208 CR 384 (patron at fast-food restaurant attacked by vandal wielding baseball bat; security guard held to have had special relationship with customers that imposed duty to act affirmatively to protect them from assaults; foreseeability not an issue inasmuch as guard witnessed the attack). See *Rosh v Cave Imaging Sys.* (1994) 26 CA4th 1225, 32 CR2d 136 (manager shot by terminated employee; security company held 75 percent at fault; proximate cause sufficiently shown).

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§10.7 2. Others' Criminal Acts; Foreseeability; Prior Similar Instances

The owner of a business or public premises has a duty to secure it against *foreseeable* criminal acts that are likely to occur in the absence of precautionary measures, even when the owner does not actually know of the particular assailant's presence or criminal intent. See *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 674, 25 CR2d 137 (discussed below); *Isaacs v Huntington Mem. Hosp.* (1985) 38 C3d 112, 124, 131, 211 CR 356; *Peterson v San Francisco Community College Dist.* (1984) 36 C3d 799, 807, 205 CR 842; *Claxton v Atlantic Richfield Co.* (2003) 108 CA4th 327, 133 CR2d 425 (test is prior similar incidents, not prior identical incidents; owner of gas station that had had gang-related robberies in the past could be liable for failing to take steps that would have prevented racially motivated assault against patron). See Annos, 54 ALR5th 379 (1997) (apportioning liability between landowners and assailants for injuries to crime victims); 31 ALR5th 550 (1995) (liability of shopping center or business for criminal attack on patron), 28 ALR4th 80 (1984) (liability of hotel or motel for third persons' assaults on guests), 14 ALR4th 950 (1982) (store owner's liability for injury to customer during pursuit of shoplifter).

Foreseeability may be entirely lacking absent prior criminal conduct even though minimal precautions might have prevented the particular assault. *Erickson v Federal Express Corp.* (2008) 162 CA4th 1291, 1299, 77 CR3d 1 (no prior conduct alerted business to possibility that requiring invitee to park at distant corner of company lot, near unfenced canyon rim, made him likely to be attacked and robbed).

The absence of previous criminal conduct does not necessarily exonerate the owner from using ordinary care to prevent possible injury, and the relatively minor expense of making a repair that would make a criminal act more difficult to commit is a factor that may shift support liability when foreseeability is weak. See *Vasquez v Residential Inv., Inc.* (2004) 118 CA4th 269, 276, 12 CR3d 846 (simple replacement of glass pane near front door of apartment building would have made it more difficult for estranged boyfriend to enter and fatally stab victim).

Even when criminal conduct is foreseeable, policy considerations and other factors may preclude imposing a duty, or a finding of breach of duty. See *Kentucky Fried Chicken v Superior Court* (1997) 14 C4th 814, 829, 59 CR2d 756 (business owner or employee has no duty to comply with armed robber's unlawful demand for money even when robber is threatening a patron); *Vandermost v Alpha Beta Co.* (1985) 164 CA3d 771, 779, 210 CR 613 (restaurant owner, by refusing to comply with robber's demands for money, did not breach duty to customer whom armed robber threatened and shot).

Insurance policies may exclude coverage of injury caused by the criminal acts of an "insured." See *Northland Ins. Co. v Briones* (2000) 81 CA4th 796, 97 CR2d 127 (mobilehome homeowner's policy exclusion for sexual abuse, molestation, or harassment); *California Cas. Indem. Exch. v Frerichs* (1999) 74 CA4th 1446, 88 CR2d 858 (son "house-sitting" while parents on vacation not insured "resident of the household"); *20th Century Ins. Co. v Stewart* (1998) 63 CA4th 1333, 74 CR2d 492 (unambiguous policy provision excluded coverage of liability to guest accidentally shot by policyholders' son). See also *Kramer v State Farm Ins. Co.* (1999) 76 CA4th 332, 90 CR2d 301 (coverage of "ownership, maintenance, and use" of premises did not insure owner against liability for sexual molestation).

On factors in establishing the liability of a homeowner for injury by another's criminal conduct to a guest after the guest has left the house, see *Margaret W. v Kelley R.* (2006) 139 CA4th 141, 42 CR3d 519 (parent had not voluntarily undertaken to protect the friend) (see §§1.8, 1.26).

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§10.8 a. Duty to Hire Security Guards

To recover damages from a business owner on the theory that the owner had failed to provide adequate security to prevent a criminal attack by others, the patron must show "heightened foreseeability" in the form of prior similar criminal incidents or other indications of a reasonably foreseeable risk of such an attack. *Delgado v Trax Bar & Grill* (2005) 36 C4th 224, 245, 30 CR3d 145 (showing of "prior nearly identical criminal incidents" not required). In addition, even absent such a heightened foreseeability showing, a business owner that has actual notice of an impending assault on a patron has a special-relationship-based duty to take reasonable, relatively simple, and minimally burdensome steps to avert that danger. 36 C4th at 245 (liability based on security guards' (or "bouncers") failure to keep likely-to-be-assaulted patron separated from potential assailants; owner liable for failing to "respond to events unfolding in its presence"); *Morris v De La Torre* (2005) 36 C4th 260, 30 CR3d 173 (restaurant proprietor could be liable when employees watched person (who had accompanied friends to the restaurant but did not himself eat there) being attacked in parking lot but failed to call 911 on his behalf; invitees in addition to customers have special relationship with business proprietors. On a proprietor's liability for injury to a person deemed an invitee although not a customer, see *Farrier v Levin* (1959) 176 CA2d 791, 1 CR 742 (plaintiff accompanying friend to delicatessen was potential customer). See also *Rice v Center Point, Inc.* (2007) 154 CA4th 949, 65 CR3d 312 (private residential substance abuse treatment facility operators not liable to victims of inmates who escaped, taking "unsecured knife," and stabbed plaintiffs).

NOTE: In *Delgado,* the majority based its discussion of the "heightened foreseeability" criterion on its review from its review of *Ann M.*, and other cases. The court disapproved any suggestion that heightened foreseeability needed to be shown in all premises liability cases "regardless of the extent of the burden sought to be imposed on the defendant," that might be derived from *Hassoon v Shamieh* (2001) 89 CA4th 1191, 1195, 107 CR2d 658, disapproved on other grounds in *Delgado v Trax Bar & Grill* (2005) 36 C4th 224, 244, 30 CR3d 145. 36 C4th 244. The majority also devoted part of its opinion (see 36 C4th 247) to discussing "overbroad and potentially misleading" language and analysis in *Mata v Mata* (2003) 105 CA4th 1121, 130 CR2d 141 (hiring security guards showed bar proprietor's knowledge of threat; triable issues on whether proprietor had done enough to prevent shooting by disgruntled patron; premises owner not liable).

A duty to take affirmative action to control others' future wrongful acts is imposed only when such conduct could reasonably have been anticipated. *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 676, 25 CR2d 137 (commercial landlord not liable to lessee's employee criminally assaulted by visitor). The scope of the duty is determined in part by balancing the foreseeability of the harm against the burden of the duty to be imposed. 6 C4th at 678. A high degree of foreseeability is required when the burden of preventing future harm is great; a lesser degree of foreseeability is sufficient when there are strong policy reasons for preventing the harm, or when the harm can be prevented by simple means. Thus, a high degree of foreseeability may be required to impose on an owner a duty to employ security guards. 6 C4th at 679. See *Lopez v Baca* (2002) 98 CA4th 1008, 1017, 120 CR2d 281 (nightclub owner's hiring of security guards for weekends insufficient basis for imposing liability for absence of guards on weekday when one patron shot another; see §1.24).

Conversely, when preventive measures would have been relatively inexpensive, prior incidents of criminal conduct not entirely similar to the one sued on may provide sufficient foreseeability. See *Tan v Arnel Mgmt. Co.* (2009) 170 CA4th 1087, 88 CR3d 754 (shooting during carjacking in ungated common area of apartment complex; one-time cost of installing additional security gates justified liability under sliding-scale balancing analysis).

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Source: Torts/California Tort Guide/10 Premises Liability/§10.9 b. Other Cases Applying Ann M. Balancing

§10.9 b. Other Cases Applying *Ann M.* Balancing

For further reiteration and application of the *Ann M.* analysis, see *Sharon P. v Arman, Ltd.* (1999) 21 C4th 1181, 1189, 91 CR2d 35, disapproved on other grounds at 25 C4th 854 (commercial landlord not liable to tenant for criminal assault in office building's underground parking garage; attack not sufficiently foreseeable to require security measures given 10-year absence of other assaults). See also *Roe v McDonald's Corp.* (2005) 129 CA4th 1107, 29 CR3d 127 (restaurant employees could not have foreseen that patron would be sexually assaulted in restroom, although patron had told cashier that man, now apparently gone, had been making sexually suggestive facial expressions at her through the restaurant window); *Alvarez v Jacmar Pac. Pizza Corp.* (2002) 100 CA4th 1190, 1211, 122 CR2d 890 (murder following fight in restaurant deemed not foreseeable by restaurant employees; evidence of prior incidents at restaurant excluded or deemed irrelevant); *Nicole M. v Sears, Roebuck & Co.* (1999) 76 CA4th 1238, 90 CR2d 922 (plaintiff assaulted in parking lot failed to show prior incidents or that owner should have foreseen such an attack; foreseeability requirement not satisfied by fact that lot was bordered by thick bushes in which homeless persons had camped because plaintiff was not attacked by such a person).

Ann M. v Pacific Plaza Shopping Ctr. (1993) 6 C4th 666, 25 CR2d 137, purports to "refine" the foreseeability discussion in *Isaacs v Huntington Mem. Hosp.* (1985) 38 C3d 112, 125, 131, 211 CR 356. *Isaacs* rejects as too rigid a line of court of appeal cases that had ruled that foreseeability could not be shown without proof that prior similar criminal conduct had occurred on or near the premises. Under *Isaacs,* foreseeability can be shown by evidence of either prior incidents or such other factors as the nature, condition, and location of the defendant's premises. 38 C3d at 129. See *Frances T. v Village Green Owners Ass'n* (1986) 42 C3d 490, 502, 229 CR 456 (noted in §10.34).

NOTE: It appears that the *Ann M.* foreseeability standard would have permitted liability in older cases in which there were prior instances of criminal activity (not necessarily assaults) in the area, and the nature or location of the premises or business created a special temptation or opportunity for criminal conduct. See, *e.g., Isaacs v Huntington Mem. Hosp.* (1985) 38 C3d 112, 211 CR 356 (evidence of prior violent attacks); *Cohen v Southland Corp.* (1984) 157 CA3d 130, 141, 203 CR 572 (convenience store patron shot while attempting to prevent armed robbery; several prior robberies shown; "24-hour convenience store makes an attractive target for night crime activity"); *Gomez v Ticor* (1983) 145 CA3d 622, 628, 193 CR 600 (invitee shot by robbers in defendant's parking structure; 16 prior acts of theft or vandalism; structure conducive to crime). See comments in *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 680 n8, 25 CR2d 137. The supreme court majority in *Sharon P. v Arman, Ltd.* (1999) 21 C4th 1181, 1191, 91 CR2d 35, disapproved on other grounds at 25 C4th 854, (1) says that facts in the case spare it from considering whether some types of commercial property are so inherently dangerous that, even in the absence of prior similar incidents, providing security guards would fall within the scope of a landlord's duty of care; (2) rejects the view that underground parking structures are so inherently dangerous that security guards are required even absent prior incidents; and (3) concludes that the plaintiff had failed to establish that other measures, short of hiring guards, were likely to have prevented the attack. The majority acknowledges, without endorsing, cases recognizing that a landlord's liability for a criminal assault could be based on a failure to provide adequate lighting, including *Frances T. v Village Green Owners Ass'n, supra*; *Peterson v San Francisco Community College Dist., supra*; *Penner v Falk* (1984) 153 CA3d 858, 200 CR 661 (noted in §10.38); *Slapin v Los Angeles Int'l Airport* (1976) 65 CA3d 484, 135 CR 296 (noted in §8.29).

Cases in which it appears that the *Ann M.* foreseeability test would not have been met include *Gregorian v National Convenience Stores, Inc.* (1985) 174 CA3d 944, 949, 220 CR 302 (patron suddenly attacked by marauding gang in market that had experienced no similar incidents or gang activity); *Lopez v McDonald's Corp.* (1987) 193 CA3d 495, 509, 238 CR 436 (fast-food restaurant customers killed in "once-in-a-lifetime massacre" by suicidal gunman).

The principle that a property owner is not liable for injury resulting from the criminal conduct when foreseeability of the injury is low and the cost of available preventative measures high has been applied to exonerate a property owners' association and the security firm it employs to patrol the community from liability for the conduct from one of its

members. *Titus v Canyon Lake Prop. Owners Ass'n* (2004) 118 CA4th 906, 911, 13 CR3d 807 (passenger riding in car with intoxicated resident killed when car hit tree).

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§10.10 3. Establishing Legal (Proximate) Cause

A visitor who has established that the property owner owed him or her a duty to take additional steps to prevent injury by criminal intruders, and who establishes that the defendant breached that duty, must also establish that the defendant's negligence was "an actual, legal cause" of the visitor's injuries. *Saelzer v Advanced Group 400* (2001) 25 C4th 763, 766, 107 CR2d 617 (inasmuch as assailants are unknown and were never apprehended, Federal Express employee unable to prove that they would not have succeeded in assaulting her even if owner had provided additional security guards or locked security gates). See also *Sharon P. v Arman, Ltd.* (1999) 21 C4th 1181, 1188, 91 CR2d 35 (noted in §10.7); *Rinehart v Boys & Girls Club* (2005) 133 CA4th 419, 34 CR3d 677 (no evidence that owner's lack of supervision or upkeep was "substantial factor" in injury to club member on playground from rock thrown by nonmember from nearby hill; see also §10.6); *Leslie G. v Perry & Assocs.* (1996) 43 CA4th 472, 488, 50 CR2d 785 (noted in §10.36; broken security gate not shown to be a cause of rape of tenant in apartment garage). But see *Raven H. v Gamette* (2007) 157 CA4th 1017, 1025, 68 CR3d 897 (tenant sexually assaulted by intruder raised triable issue whether condition of apartment complex was substantial factor causing her injuries; no need to present assailant's testimony that bars on window, special locks, or working light bulb would have prevented attack).

Thus, a plaintiff who alleges the owner's negligent failure to provide adequate security guards must prove that enhanced security measures would more likely than not have prevented or deterred the wrongful conduct. *Sandoval v Bank of America* (2002) 94 CA4th 1378, 1387, 115 CR2d 128 (trial court erred by suggesting to jurors that plaintiff could recover only if nonnegligent security measures would "absolutely" have prevented the injury). See *Nola M. v University of S. Cal.* (1993) 16 CA4th 421, 428, 20 CR2d 97 (failure to show that additional guards or other measures would have deterred campus rape); *Lopez v McDonald's Corp.* (1987) 193 CA3d 495, 516, 238 CR 436 (presence of unarmed, uniformed security guard could not have deterred or prevented massacre at fast-food restaurant); *Noble v Los Angeles Dodgers, Inc.* (1985) 168 CA3d 912, 918, 214 CR 395 (no evidence that more security guards would have prevented postgame assault by two drunks in stadium parking lot).

Evidence that shows the foreseeability of a third person's wrongful conduct sometimes also tends to show proximate cause. See *Isaacs v Huntington Mem. Hosp.* (1985) 38 C3d 112, 131 n8, 211 CR 356; *Rosh v Cave Imaging Sys.* (1994) 26 CA4th 1225, 1236, 32 CR2d 136 (foreseeable that terminated employee posed danger to manager who terminated him; security guards failed to refuse entry). But a general finding of foreseeability of some kind of future injury or assault on the premises does not inevitably establish that an owner's omission to provide additional guards or lighting was a legal cause of a plaintiff's injury). *Saelzer v Advanced Group 400* (2001) 25 C4th 763, 778, 107 CR2d 617 (plaintiff must show that defendant's act or omission was "substantial factor" in bringing about plaintiff's injury).

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§10.11 4. Liability to Criminal Visitors

Under CC §847, an owner (including a public entity) of any interest in real property is not liable for injury or death on the property resulting from the commission of specified felonies "by the injured or deceased person." The statute does not limit the liability of an owner or owner's agent that otherwise exists for willful, wanton, or criminal conduct, or for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. CC §847(f). An owner is immune under §847 from liability for conduct that is lawful even if the conduct involved the intentional use of deadly force. *Calvillo-Silva v Home Grocery* (1998) 19 C4th 714, 80 CR2d 506, disapproved on other grounds at 25 C4th 853 n19 (store employee shot man fleeing from armed robbery attempt of which man was later convicted; immunity applied because shooting was justified under CC §50 rules for self-defense and defense of own or a master's property). See *L&B Real Estate v Superior Court* (1998) 67 CA4th 1342, 79 CR2d 759 (no immunity when landlord failed to establish that visitor shot and killed on premises was there for a criminal purpose).

NOTE: The supreme court in *Calvillo-Silva v Home Grocery, supra,* expressly declined to rule on whether CC §847 immunity (1) extends to an owner's agent or employee (as well as the owner) or (2) immunizes the owner from respondeat superior liability even if agents and employees are not immune. 19 C4th at 718 n2.

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Source: Torts/California Tort Guide/10 Premises Liability/§10.12 E. Owner's Liability for Unsafe Condition

§10.12 E. Owner's Liability for Unsafe Condition

The extent of an owner's duty to use ordinary care to keep the property in a reasonably safe condition is based on the foreseeability that the condition will cause injury. See *Rowland v Christian* (1968) 69 C2d 108, 119, 70 CR 97, 104; *Fitch v LeBeau* (1969) 1 CA3d 320, 324, 81 CR 722. Thus, the owner of an amusement park that places a picnic area near a parking lot may be liable when an out-of-control car leaves the lot and hits picnickers. *Robison v Six Flags Theme Parks, Inc.* (1998) 64 CA4th 1294, 75 CR2d 838 (owner liable even though no similar accidents had occurred; picnic table was placed in harm's way; reasonable person, by simple observation, would have seen danger and need for reasonable protective measures). See also *Chaffin v U.S.* (9th Cir 1999) 176 F3d 1208 (U.S. could be liable to employee attacked by polar bear in living quarters at site in Alaska under Restatement (Second) of Torts (1965) §§343 (duty to maintain safe premises), 410 (negligence in instructing contractor), or 413 (knowledge of peculiar risk)). See also *Urhausen v Longs Drug Stores Cal., Inc.* (2007) 155 CA4th 254, 65 CR3d 838 (store's maintaining of steep slope in store's disabled persons parking space, contrary to state and federal regulations, no basis for presumption of negligence in suit by patron who had parked elsewhere and was merely walking through reserved space to get to store; hers was injury the regulations were designed to prevent; also, no liability under Disabled Persons Act (DPA) (CC §§54-55.2) because slope did not interfere with access to store).

A store owner has a duty to keep the floors safe for patrons' use, recognizing that their attention will be attracted by items on the shelves. *Tuttle v Crawford* (1936) 8 C2d 126, 130, 63 P2d 1128, 1130; *Craddock v Kmart Corp.* (2001) 89 CA4th 1300, 1306, 107 CR2d 881 (plaintiff, looking at overhead directional sign, fell when she stepped on metal bracket placed there by store employees as they built a display bin; employee posted to warn customers was facing other direction). See §10.14 on owner's duty to inspect and clean floors.

An owner who is aware of a concealed condition that creates, in the absence of precautions, an unreasonable risk of harm must either repair the condition or warn the persons likely to come in contact with it. *Rowland v Christian, supra* (guest cut by cracked faucet handle); *Fitch v LeBeau, supra* (guest tripped on torn rug). See also *Kasparian v AvalonBay Communities, Inc.* (2007) 156 CA4th 11, 23, 66 CR3d 885 (photographs insufficient to support trial court's summary judgment that recessed drain in walkway was open and obvious); *Lostritto v Southern Pac. Transp. Co.* (1977) 73 CA3d 737, 744, 140 CR 905 (failure to fence off trestle or post warning against diving from it). See §10.16 on warnings generally.

More broadly, an owner's duty to use ordinary care may include a duty to make reasonable inspections of the premises to guard against possible dangers, to make the property reasonably safe for intended or foreseeable users and uses, and to warn of latent or concealed dangers. See *Beauchamp v Los Gatos Golf Course* (1969) 273 CA2d 20, 27, 77 CR 914, 919 (golf course patron).

NOTE: Before 1968 (see §10.3), such duties were owed only to invitees; an owner owed a licensee only the duty to warn of a known, nonobvious condition that amounted to a trap. See *Huselton v Underhill* (1963) 213 CA2d 370, 374, 28 CR 822, 824. *Rowland v Christian, supra,* however, appears to require inspections, repairs, or warnings that are reasonable in light of reasonably foreseeable uses of the property by others, whatever their status. See *Carlson v Ross* (1969) 271 CA2d 29, 31, 76 CR 209, 211 (12-year-old guest fell and injured hand on jagged pipe protruding slightly from ground in yard).

The owner of undeveloped, unused land is not liable for injuries to trespassing adults caused by dangerous conditions created solely by their unauthorized activities on the premises. *Lucas v Pollock* (1992) 7 CA4th 668, 675, 8 CR2d 918 (trespassing farm workers injured by fire in their encampment, erected without owner's permission; but see *Reyes v Koska* (1998) 65 CA4th 451, 76 CR2d 457, discussed in §10.38).

See §10.24 (limited duty to keep premises safe for certain recreational users).

See Annos, 6 ALR6th 1 (2005) (building owners' liability for injury from nonautomatic swinging door), 1 ALR6th 297 (2005) (store owners' liability for, *e.g.,* defective shelving), 123 ALR5th 1 (2004) (store owners' liability for falls from tracked-in water or snow), 64 ALR5th 1 (1998) (private residential swimming pool), 44 ALR5th 525 (1996) (electrically operated door), 42 ALR5th 1 (1996) (shopping cart or baby stroller supplied by owner), 40 ALR5th 807 (1996)

(amusement device in store), 40 ALR5th 135 (1996) (object projecting into store aisle), 34 ALR4th 572 (1984) (wharf owner's or operator's liability to invitees or licensees), 24 ALR4th 696 (1983) (spilled liquid in store), 21 ALR4th 472, 515 (1983) (evidence of prior accidents; stairways and other locations), 20 ALR4th 438, 517 (1983) (tracked-in water or snow).

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§10.13 1. Extent of Premises for Which Owner Is Responsible

An owner's duty to maintain the premises in a reasonably safe condition extends to all areas that visitors are expressly or impliedly invited to use and over which the owner exercises actual or apparent control, including

- areas within a building used in common by patrons of several businesses (*Danisan v Cardinal Grocery Stores, Inc.* (1957) 155 CA2d 833, 837, 318 P2d 681, 683 (separately owned departments of food market));
- areas outside the building used by the general public in common with business visitors (*Johnston v De La Guerra Props.* (1946) 28 C2d 394, 400, 170 P2d 5, 8 (parking lot on adjacent premises); *Southland Corp. v Superior Court* (1988) 203 CA3d 656, 666, 250 CR 57 (adjacent vacant, unpaved "overflow" parking lot regularly used by store customers); see Anno, 74 ALR5th 49 (1999) (snow or ice in parking lot)); and
- areas of ingress and egress that visitors are implicitly induced to use (*Beauchamp v Los Gatos Golf Course* (1969) 273 CA2d 20, 24, 77 CR 914, 918 (walkway to golf course); *Face v Sarkis* (1962) 201 CA2d 45, 50, 19 CR 856, 859 (private road); *Perez v Ow* (1962) 200 CA2d 559, 560, 19 CR 372, 373 (parking lot); *Sockett v Gottlieb* (1960) 187 CA2d 760, 767, 9 CR 831, 835 (front lawn); see Annos, 99 ALR2d 725 (1965) (electric door), 81 ALR2d 750, 756 (1962) (exterior ramp)).

Conversely, a defendant is not ordinarily liable for injuries that occur on property not in his ownership, possession, or control unless he created the condition or had a right to control activities at the site. *Isaacs v Huntington Mem. Hosp.* (1985) 38 C3d 112, 134, 211 CR 356 (hospital's insurer had no ownership or possessory interest in hospital and did not control its security practices); *Hassoon v Shamieh* (2001) 89 CA4th 1191, 1195, 107 CR2d 658, partially disapproved at 36 C4th 244 (see Note in §10.7; store owner not liable to customer hit in drive-by shooting). Further, an owner has no duty to warn of dangers beyond his property that he did not create. *Swann v Olivier* (1994) 22 CA4th 1324, 1330, 28 CR2d 23, disapproved on other grounds at 14 C4th 1166. Thus, liability of the property owner or occupant has been denied when the injury occurred

- on adjacent private property (*Lucas v George T.R. Murai Farms, Inc.* (1993) 15 CA4th 1578, 1589, 19 CR2d 436 (farmworkers injured in fire in temporary housing on adjacent property; but see *Reyes v Koska* (1998) 65 CA4th 451, 76 CR2d 457, discussed in §10.38); *Martinez v Pacific Bell* (1990) 225 CA3d 1557, 1561, 275 CR 878 (telephone company not liable for assault on adjacent property owner by persons hanging about public telephone booth); *Steinmetz v Stockton City Chamber of Commerce* (1985) 169 CA3d 1142, 1147, 214 CR 405 (lessee in industrial park not liable for business "mixer" invitee's stabbing in another part of premises));
- on the defendant's property if caused by adjacent property conditions over which the defendant had no control (*Hamilton v Gage Bowl, Inc.* (1992) 6 CA4th 1706, 1711, 8 CR2d 819 (parking lot owner not liable to customer injured by sign that fell off adjacent building));
- on an adjacent public street or sidewalk (*Contreras v Anderson* (1997) 59 CA4th 188, 69 CR2d 69 (simple maintenance of adjoining city-owned strip not an exercise of control over it); *Medina v Hillshore Partners* (1995) 40 CA4th 477, 483, 46 CR2d 871 (owner had no duty to protect members of public from gang members who congregated around apartment complex and assaulted persons on adjacent public streets); *Seaber v Hotel Del Coronado* (1991) 1 CA4th 481, 487, 2 CR2d 405 (hotel not liable when patron killed while crossing street to reach parking lot frequently used by patrons); *Balard v Bassman Event Sec.* (1989) 210 CA3d 243, 240, 258 CR 343 (nightclub security guard had no duty to warn female customer of group of drunken men in nearby parked car); *Donnell v California W. Sch. of Law* (1988) 200 CA3d 715, 720, 246 CR 199 (law school in high crime area not liable to student injured on adjacent sidewalk); *A. Teichert & Son v Superior Court* (1986) 179 CA3d 657, 663, 225 CR 10 (gravel plant owner had no duty to post signs warning of truck traffic in and out of plant); *Nevarez v Thriftimart, Inc.* (1970) 7 CA3d 799, 805, 87 CR 50 (store where amusement rides had attracted child had no duty to protect him in crossing adjacent street); see §10.40 (sidewalk defects), §10.41 (conditions affecting vehicle traffic), §10.42 (street vendors)); or
- in the ocean adjacent to defendant's property (*Princess Hotels Int'l v Superior Court* (1995) 33 CA4th 645, 652, 39 CR2d 457, disapproved on other grounds at 14 C4th 1166 (hotel guests swimming in ocean adjacent to

hotel); *Swann v Olivier, supra* (no duty to warn of dangerous condition of ocean beyond defendants' private beach); but see *Pacheco v U.S.* (9th Cir 2000) 220 F3d 1126 (public entity liability for failing to warn users of publicly operated beach park of undertow dangers after giving toy buckets to persons paying for access to beach; see §8.18)).

Owners or businesses are liable for injuries "not technically on" their premises if they (1) imposed or created some palpable external effect on the area where the plaintiff was injured or (2) received a special commercial benefit from that area and also had direct or de facto control of it. See *Swann v Olivier, supra*. As to the second exception, *Princess Hotels Int'l v Superior Court, supra,* held that the defendant must have control of the injury site in addition to realizing a commercial benefit from it; "the mere fact that an aesthetic natural phenomenon attracts tourists may not ipso facto impose such liability."

See §2.17 on air carriers' duties to passengers, §10.34 on injuries in condominium developments, and §10.29 on duty to patrons of resort or amusement place.

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§10.14 2. Knowledge of Condition; Inspection

A store owner, although not an insurer of its patrons' safety, owes them a duty to exercise reasonable care in keeping the premises safe and fulfills that duty by making reasonable inspections of areas open to customers; the care required is commensurate with the risks involved. *Ortega v Kmart Corp.* (2001) 26 C4th 1200, 1203, 114 CR2d 470 (customer injured when he slipped in spilled milk raised inference of negligence by showing area had not been inspected within reasonable time period; question of fact for jury whether dangerous condition existed long enough to have been discovered and remedied had reasonable care been used). That is, a plaintiff has the burden of producing evidence that the dangerous condition existed for at least a sufficient time to support a finding that the owner had constructive notice of the hazard, but may demonstrate such constructive notice by showing the site had not been inspected within a reasonable time. 26 C4th at 1203. See *Henderson v McGill* (1963) 222 CA2d 256, 259, 34 CR 897, 899 (business visitors; ordinary care requires owners to make reasonable inspections to discover dangerous conditions created by others). But see *Martinez v Bank of America* (2000) 82 CA4th 883, 98 CR2d 576 (bank that had foreclosed on property but had not yet taken possession not liable for death caused by dogs owned by previous owners who still occupied it; see §3.18); *Perez v Ow* (1962) 200 CA2d 559, 560, 19 CR 372, 373 (owner not normally responsible for conditions created by others unless owner had actual or constructive notice in time to remedy them; see §10.12).

California law retains the requirement that the owner have had actual or constructive knowledge of the dangerous condition that caused a patron's fall, even in stores that contain a fast food area. *Moore v Wal-Mart Stores, Inc.* (2003) 111 CA4th 472, 3 CR3d 813 (customer slipped on French fry; trial judge erred by applying rule in other notice instruction not required for fast food operations, apparently on theory that owner could always reasonably anticipate presence of dangerous condition in such circumstances).

An inference that the condition existed long enough to have been discovered may be drawn from evidence such as the following:

- The owner's failure to inspect within a particular period of time (*Ortega v Kmart Corp., supra*; *Bridgman v Safeway Stores, Inc.* (1960) 53 C2d 443, 447, 2 CR 146, 148); or
- The nature of the condition itself (*Scott v Alpha Beta Co.* (1980) 104 CA3d 305, 309, 163 CR 544 (customers tracked rainwater into store); *Olsen v Roos-Atkins* (1962) 208 CA2d 259, 262, 25 CR 190, 192 (banana peel)).

Owners are deemed to know of, and are responsible for, conditions created by their employees (*Hatfield v Levy Bros.* (1941) 18 C2d 798, 806, 117 P2d 841, 845), by contractors (see §10.15), and, in some instances, by tenants (*Swanberg v O'Mectin* (1984) 157 CA3d 325, 330, 332, 203 CR 701; see §10.38).

An owner's duty to inspect a premises occupied by a tenant can become greater during the period between termination of the tenancy and the tenant's surrender of possession, because it is expected that the owner would anticipate that the tenant's interest in inspecting and correcting defects would decrease. *Stone v Center Trust Retail Props., Inc.* (2008) 163 CA4th 608, 613, 77 CR3d 556 (enhanced duty to inspect began on date eviction judgment entered).

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§10.15 3. Nondelegability of Duty to Maintain; Statutory Violation

Generally, an owner's duty to put and maintain premises in a reasonably safe condition (see §10.12) is nondelegable; *i.e.,* the owner cannot avoid liability for harm resulting from negligent construction or maintenance by hiring an independent contractor to perform those tasks. See *Knell v Morris* (1952) 39 C2d 450, 456, 247 P2d 352 (heater installation); *Koepnick v Kashiwa Fudosan Am., Inc.* (2009) 173 CA4th 32, 92 CR3d 453 (elevator maintenance); *Srithong v Total Investment Co.* (1994) 23 CA4th 721, 726, 28 CR2d 672 (lessor that employed roofing company liable to lessee's employee burned by hot tar). See Annos, 99 ALR5th 141 (2002) (owner's, lessee's, or manager's liability for injury or death from use of automatic passenger elevator), 96 ALR3d 1213 (1979) (liability to customer for injury caused by independent contractor's negligent repair or alteration work). See also *Swanberg v O'Mectin* (1984) 157 CA3d 325, 330, 203 CR 701 (duty to keep shrubs from obstructing view of intersection could not be delegated to tenants). See §10.33 on landlord's nondelegable duty to maintain common areas.

A particular duty imposed on the owner by statute or ordinance is nondelegable. *Finnegan v Royal Realty Co.* (1950) 35 C2d 409, 432, 218 P2d 17, 31; *Evard v Southern Cal. Edison* (2007) 153 CA4th 137, 62 CR3d 479 (billboard owners had nondelegable duties imposed by billboard safety regulations and could be liable for injury sustained by contractor's employee while changing ads); *Lucas v Hesperia Golf & Country Club* (1967) 255 CA2d 241, 251, 63 CR 189, 196). Violation of such an enactment gives rise to a presumption of negligence (see §1.31) if

- the enactment was designed to protect against the particular danger involved (*Nunneley v Edgar Hotel* (1950) 36 C2d 493, 497, 225 P2d 497, 499); and
- a causal relationship is shown (*Haft v Lone Palm Hotel* (1970) 3 C3d 756, 765, 91 CR 745 (swimming pool; burden to negate causation shifted to defendant).

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§10.16 4. Warnings; Obvious Dangers

An owner can sometimes fulfill the obligation to protect a visitor against a concealed dangerous condition by warning of the danger (without actually remedying it), so that the visitor, like the host, can take precautions. See *Rowland v Christian* (1968) 69 C2d 108, 119, 70 CR 97, 104; *Fitch v LeBeau* (1969) 1 CA3d 320, 325, 81 CR 722. Whether the warning given was effective to protect the visitor is a jury question. *Taylor v Centennial Bowl, Inc.* (1966) 65 C2d 114, 124, 52 CR 561, 566.

Generally, an owner who has used ordinary care under the circumstances is not liable for injury to a visitor that results from a dangerous condition that should have been obvious to a visitor. See *Souza v Squaw Valley Ski Corp.* (2006) 138 CA4th 262, 41 CR3d 389 (8-year-old skied into clearly visible snow-making hydrant; see also §10.46); *Lucas v George T.R. Murai Farms, Inc.* (1993) 15 CA4th 1578, 1590, 19 CR2d 436 (no duty to warn of danger so obvious that visitor should, through ordinary use of senses, have seen it; but see *Reyes v Koska* (1998) 65 CA4th 451, 76 CR2d 457, discussed in §10.38); *Danieley v Goldmine Ski Assocs.* (1990) 218 CA3d 111, 121, 266 CR 749; *Beauchamp v Los Gatos Golf Course* (1969) 273 CA2d 20, 27, 77 CR 914, 919. See also *Pike v Frank G. Hough Co.* (1970) 2 C3d 465, 473, 85 CR 629, on obvious dangers generally.

The very obviousness of the danger may negate any foreseeability that the condition would cause injury. *Dixon v St. Francis Hotel* (1969) 271 CA2d 739, 743, 77 CR 201, 204. There may, however, be a question of fact whether the condition was actually obvious. *Williams v Carl Karcher Enters.* (1986) 182 CA3d 479, 227 CR 465, disapproved on other grounds at 8 C4th 580 (slippery floor did not look wet).

The obvious nature of a dangerous condition does not always absolve a defendant of liability. If it is foreseeable that the danger may cause injury despite its obviousness, as when necessity requires invitee workers to encounter it, there may be a duty to remedy the danger. *Martinez v Chippewa Enters.* (2004) 121 CA4th 1179, 18 CR3d 152 (obviousness of danger—water on sidewalk—may obviate duty to warn of danger, but not duty to rectify dangerous condition that creates foreseeable risk of injury despite its obviousness); *Osborn v Mission Ready Mix* (1990) 224 CA3d 104, 121, 273 CR 457 (rejecting contrary statements in *Elder v Pacific Tel. & Tel. Co.* (1977) 66 CA3d 650, 136 CR 203, and *Souza v Pratico* (1966) 245 CA2d 651, 54 CR 159, as unnecessary dicta). See *Donohue v San Francisco Hous. Auth.* (1993) 16 CA4th 658, 666, 20 CR2d 148 (duty to firefighter conducting safety inspection; obviousness raises issue of comparative fault only).

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§10.17 5. Duty to Rescue or Render Aid

Generally, a person who has not created a peril is not liable for failure to take affirmative action to assist or protect another person unless there is a special relationship between them. *Lucas v George T.R. Murai Farms, Inc.* (1993) 15 CA4th 1578, 1591, 19 CR2d 436 (but see *Reyes v Koska* (1998) 65 CA4th 451, 76 CR2d 457, discussed in §10.38). See *Cohen v Southland Corp.* (1984) 157 CA3d 130, 144, 203 CR 572 (convenience store clerk, who feared for his own life, had no duty to aid customer shot by robber; only duty related to protecting patron from assault itself). See discussion in §10.7 of *Vandermost v Alpha Beta Co.* (1985) 164 CA3d 771, 210 CR 613). See Restatement (Second) of Torts §314 (1965).

Health and Safety Code §28689 requires restaurants to post state-approved first-aid instructions on removing food stuck in someone's throat. However, the failure to post such instructions does not in itself subject the proprietor to liability for a choking emergency. Further, the statute does not impose a duty to remove the stuck food nor liability for attempting to do so in accordance with the instructions. Under §28689, a restaurant meets its duty to a patron in distress from choking by promptly summoning an ambulance. *Breaux v Gino's, Inc.* (1984) 153 CA3d 379, 382, 200 CR 260.

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F. Duties to Particular Visitors

§10.18 1. Minors

Business proprietors have traditionally been required to exercise special caution to protect minor invitees who may not understand dangers on the premises, and have been held liable for injuries to children using the premises for an unintended purpose if the conduct was foreseeable. See *Crane v Smith* (1943) 23 C2d 288, 300, 144 P2d 356 (finger in grinder); *Freeman v Mazzera* (1957) 150 CA2d 61, 63, 309 P2d 510 (playing on lattice); *Roberts v Del Monte Props. Co.* (1952) 111 CA2d 69, 73, 243 P2d 914 (playing on hotel furniture); *Kataoka v May Dep't Stores Co.* (1943) 60 CA2d 177, 185, 140 P2d 467 (hand caught in escalator).

On a homeowner's duties to child licensees, see *Padilla v Rodas* (2008) 160 CA4th 742, 73 CR3d 114 (2-year-old who drowned in backyard pool when left unattended for 5 minutes; no showing that child reached pool through gate with defective latch or that homeowners had duty to supervise child); *Carlson v Ross* (1969) 271 CA2d 29, 31, 76 CR 209 (12-year-old social guest (licensee) playing tag fell and cut hand on partially concealed pipe). See also Anno, 26 ALR3d 317 (1969) (duty to warn child licensee).

When a child is injured while trespassing on the defendant's property, the attractiveness of the property to children is but one factor in determining whether the injury was foreseeable (see §§10.3-10.4); the "attractive nuisance" doctrine, formerly invoked to aid minor trespassers, no longer has a separate existence. See *Smith v Americania Motor Lodge* (1974) 39 CA3d 1, 7, 113 CR 771 (error to give instruction based on Restatement (Second) of Torts §339 (1965)).

A child care provider assumes a special relationship with children and has a duty to protect them from others' misconduct. *Wallace v Der-Ohanian* (1962) 199 CA2d 141, 144, 18 CR 892 (operator of summer camp). See *Pamela L. v Farmer* (1980) 112 CA3d 206, 211, 169 CR 282 (defendant wife, who knew husband's history, liable for his molestation of children invited by wife to swim while she was out). A homeowner, on the other hand, is not automatically liable when a relative (son or brother) criminally molests a child in that home. See *Eric J. v Betty M.* (1999) 76 CA4th 715, 729, 90 CR2d 549 (parents and brothers of person on parole from conviction for child molestation not liable for failing to warn parolee's new girlfriend when parolee molested her 8-year-old son; see §§1.23, 1.26). See also *Romero v Superior Court* (Ryan N.) (2001) 89 CA4th 1068, 107 CR2d 801 (homeowners not liable for sexual assault by one teenage visitor on another; see §1.26).

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§10.19 2. Firefighters, Peace Officers, and Emergency Medical Personnel (Firefighter's Rule)

The firefighter's rule is a legal policy that, with specific exceptions, immunizes anyone who negligently started a fire (or contributed to causing an incident) from tort liability to a publicly employed firefighter (or peace officer or "emergency medical personnel") who was injured while responding to the fire (or incident). The rule is recognized, and exceptions are stated, in CC §1714.9. See *Lipson v Superior Court* (1982) 31 C3d 362, 373 n6, 182 CR 629. See generally §1.55. On application of the rule in motor vehicle cases, see §4.79.

The rule, viewed as a form of assumption of risk, has been invoked as a complete defense by property owners and occupiers in a variety of situations. See, *e.g., Walters v Sloan* (1977) 20 C3d 199, 204, 142 CR 152 (owner who furnished alcohol and drugs to guests, which led to fracas in which police officer was injured); *Hodges v Yarian* (1997) 53 CA4th 973, 62 CR2d 130 (apartment building owner not liable to off-duty deputy sheriff injured while scuffling with intruder in building's garage); *Baker v Superior Court* (1982) 129 CA3d 710, 181 CR 311 (ranch owners and employees not liable to "paid-call" firefighters when controlled burn went out of control); *BART v Superior Court* (1980) 113 CA3d 1018, 1022, 170 CR 390 (no liability to firefighters for failure to provide adequate ventilation, etc., in tunnel where fire occurred). See also *Seibert Sec. Servs. v Superior Court* (1993) 18 CA4th 394, 22 CR2d 514 (no duty to police officer injured by hospital mental patient when officer came to hospital to escort injured suspect).

See Annos, 25 ALR5th 97 (1994) (injury to officer by defendant resisting arrest), 89 ALR4th 1079 (1991) (applicability to emergency medical personnel), 30 ALR4th 81 (1984) (liability of owner or occupant to police officer), 11 ALR4th 597 (1982) (liability of owner or occupant to firefighter), 91 ALR3d 1202 (1979) (liability to persons other than firefighters who attempt to control fire or save life).

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a. Exceptions

§10.20 (1) Independent Acts or Conditions

The firefighter's rule does not bar recovery for injury caused by independent acts of misconduct that were committed after the firefighter or officer arrived at the scene. *Lipson v Superior Court* (1982) 31 C3d 362, 371, 182 CR 629 (firefighter responded to chemical boilover at chemical plant; defendant misled him as to toxic nature of chemicals). Nor does the rule bar recovery for a tort independent from the firefighter's reason for being at the scene when the defendant's conduct occurred before arrival there. *Stapper v GMI Holdings, Inc.* (1999) 73 CA4th 787, 792, 86 CR2d 688 (after arriving at fire, firefighter's injury (and another's death) resulted from being trapped when garage door opener malfunctioned).

Further, the rule does not bar recovery for injury caused by a known concealed dangerous condition on the premises, separate and apart from the fire or other occasion for the plaintiff's presence at the scene. *Terhell v American Commonwealth Assocs.* (1985) 172 CA3d 434, 441, 218 CR 256 (firefighter fell through concealed, unguarded roof opening); *Kocan v Garino* (1980) 107 CA3d 291, 295, 165 CR 712 (officer injured in climbing unsafe fence while pursuing suspect through owner's backyard); *Bartholomew v Klingler Co.* (1975) 53 CA3d 975, 126 CR 191 (deputy sheriff investigating burglary fell through roof of inner office).

Civil Code §1714.9(a), which at least partially codifies the independent acts or conditions exceptions (see Note, below), provides that a person is responsible for willful or negligent acts causing injury to a peace officer (or firefighter or emergency medical personnel) if the conduct causing the injury occurs after the person knows or should have known of the officer's presence.

NOTE: Civil Code §1714.9(a) appears to encompass all situations referred to in the more restrictively written CC §1714.9(b), which may thus be ignored. Further, §1714.9(a) may not have been intended to be an exclusive statement of the independent acts or conditions exception. See *Donohue v San Francisco Hous. Auth.* (1993) 16 CA4th 658, 663, 20 CR2d 148 (court upholds liability without reference to §1714.9(a); firefighter conducting unannounced safety inspection fell on negligently hosed stairs that had no nonskid treads). See also *Lipson v Superior Court* (1982) 31 C3d 362, 373 n6, 182 CR 629 (court calls its application of independent acts exception consistent with statutory provisions). Cases such as *Lipson,* equating the firefighter's rule to assumption of risk, have said that officers do not assume every possible risk they may encounter in the course of their duties, but only the risks that necessitated their presence at the scene.

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Source: Torts/California Tort Guide/10 Premises Liability/§10.21 (2) Intentional Injury

§10.21 (2) Intentional Injury

Under CC §1714.9(a)(3)-(4), a person is liable when the conduct causing the injury (a) was intended to injure the peace officer (or firefighter or emergency medical personnel) or (b) was arson as defined in Pen C §451.

NOTE: Cases decided before this enactment reached inconsistent results. *Krueger v City of Anaheim* (1982) 130 CA3d 166, 171, 181 CR 631, held that the firefighter's rule did not bar recovery for an officer's injuries caused by a ballpark patron's resisting arrest. However, *Lenthall v Maxwell* (1982) 138 CA3d 716, 188 CR 260, applied the rule to bar recovery by a police officer who was intentionally shot by the person who caused the disturbance that brought the officer to the scene.

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§10.22 b. Ultrahazardous Activities

The firefighter's rule may apply even when the defendant was engaged in an ultrahazardous activity on the premises unless the ultrahazardous activity or condition was independent from the fire that was responsible for the firefighter's presence. *Lipson v Superior Court* (1982) 31 C3d 362, 376, 182 CR 629.

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§10.23 c. Private Safety Employees

The firefighter's rule appears to apply only to public employees, not to privately employed firefighters and safety personnel. *Neighbarger v Irwin Indus.* (1994) 8 C4th 532, 548, 34 CR2d 630. But see *Tilley v CZ Master Ass'n* (2005) 131 CA4th 464, 32 CR3d 151 (homeowner's association owed no duty to protect private security firm's employee from injury at hands of party guest; employee also held to be barred by assumption of risk defense).

NOTE: The court in *Neighbarger* rejects the reasoning in *Holland v Crumb* (1994) 26 CA4th 1844, 32 CR2d 366, insofar as it applied the firefighter's rule to a privately employed tow truck driver. Note also that CC §1714.9 uses the phrase "peace officer, firefighter, or any emergency medical personnel employed by a public entity." See also discussion in §§1.55, 6.23.

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3. Recreational Users

§10.24 a. Elements of Owner's Recreational Use Immunity

Civil Code §846 provides that the owner of any possessory or nonpossessory estate or interest in real property (see §10.25) owes no duty of care to (1) keep the premises safe for entry or use by others for a recreational purpose (see §10.26) or (2) give warning of hazardous conditions, uses of, structures, or activities on the premises to persons entering for a recreational purpose. Under CC §846, the owner who gives permission to another for entry or use for recreational purposes does not thereby (a) extend any assurance that the premises are safe for such purpose, (b) give to the person to whom permission is granted the legal status of an invitee or licensee to whom a duty of care is owed, or (c) assume responsibility for or incur liability for any injury to person or property caused by any act of the permissive user.

Section 846 also provides that it does not limit liability that otherwise exists (a) for willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity, (b) for any injury suffered when permission to enter for a recreational purpose was granted for a consideration (other than any consideration paid by the state) or when consideration has been received from others for the same purpose, or (c) to anyone who is expressly invited, rather than merely permitted, by the owner to enter the premises. See §§10.27-10.28. On liability to one expressly invited, see *Calhoon v Lewis* (2000) 81 CA4th 108, 115, 96 CR2d 394 (homeowner not exonerated by §846 (but by primary assumption of risk doctrine—see §1.46) from liability to son's friend skateboarding in driveway even though friend not expressly invited to skateboard).

Basic elements of an owner's CC §846 recreational use immunity are that (1) the defendant was the owner of an "estate or interest in real property, whether possessory or nonpossessory," and (2) the plaintiff's injury resulted from an "entry or use" for "any recreational purpose." *Ornelas v Randolph* (1993) 4 C4th 1095, 1100, 17 CR2d 594 (in essence, owner's duty to nonpaying, uninvited recreational user parallels common law duty owed, before 1968 (see §10.3) to trespasser; *i.e.,* owner is immune from liability for ordinary negligence). See *Lewis v Superior Court* (1999) 19 C4th 1232, 1262, 82 CR2d 85 (plaintiff's recreational purpose did not end when he rode his horse onto defendant's private road); *Hubbard v Brown* (1990) 50 C3d 189, 197, 266 CR 491 (§846 applied to plaintiff rightfully using public property).

NOTE: On July 30, 2008, seeing no clear controlling California precedent, the United States Court of Appeals for the Ninth Circuit asked the California Supreme Court: "Does … [CC §846], California's recreational land use statute, immunize a landowner from liability for acts of vehicular negligence committed by the owner's employee in the course and scope of his employment that cause personal injury to a recreational user of that land? See *Klein v U.S*. (9th Cir 2008) 537 F3d 1027. The federal court indicated that it would be bound by the California court's interpretation of California law. The California case number is S165594. The federal court did not mention *Shipman v Boething Treeland Farms, Inc.* (2000) 77 CA4th 1424, 92 CR2d 566, in which the court concluded that CC §846 exonerated from liability to "uninvited, nonpaying sightseers" driving on property both the owner of the property *and* the owner's employee, whose negligent driving was alleged to have caused the sightseers' injuries. The opinion appears to, without discussion, expand "owners" to include an owner's employee, and to define "keep[ing] the premises safe for entry or use" to include such an employee's negligent driving. Nevertheless, on May 17, 2000, only Justice Kennard voted to review the decision (S086806).

Section 846 creates a valid exception to the premises owner's general liability (see §10.3), and it is constitutional. *Parish v Lloyd* (1978) 82 CA3d 785, 147 CR 431; *Lostritto v Southern Pac. Transp. Co.* (1977) 73 CA3d 737, 746, 140 CR 905 (youth injured when he dove from trestle into shallow river); *English v Marin Mun. Water Dist.* (1977) 66 CA3d 725, 730, 136 CR 224, disapproved on other grounds at 33 C3d 707 (summary judgment against motorcyclist who went over unmarked precipice).

It has been said that the legislative intent was to encourage private landowners to allow the "general public" to engage in recreational activities free of charge on privately owned property. See cases collected in *Mansion v U.S.* (9th Cir 1991) 945 F2d 1115, 1117 n2 (holding, however, that CC §846 also applies to park located in military base). On

public entity recreational use immunity, see §8.36.

See also CC §§846.1 (right of owner sued by recreational trail user to attorney fee from state), 846.2 (limited immunity for injury to persons invited on land to glean agricultural products for charity), 847 (limitation on liability for injuries to persons committing certain felonies).

The recreational user injured on federal land may be barred from recovering damages by the discretionary function exception to liability under the Federal Tort Claims Act (FTCA) (28 USC §§2671-2680). See *Terbush v U.S.* (9th Cir 2008) 516 F3d 1125 (climber killed by rockslide on Glacier Point in Yosemite National Park); *Lynch v U.S.* (D AZ 2008) 2008 US Dist Lexis 70551 (park employees had no duty to warn visitors of one-inch depression beside paved trail in Muir Woods; defect was trivial as matter of law; see §10.40).

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§10.25 (1) Interest in Real Property; "Entry or Use"

The recreational use immunity may be claimed by an owner of any estate *or any other interest* in real property, *whether possessory or nonpossessory*. CC §846. See *Miller v Weitzen* (2005) 133 CA4th 732, 736, 35 CR3d 73 (possessor of driveway easement over county land crossed by equestrian trail entitled to claim immunity when horse slipped on newly paved driveway; see also §10.27).

NOTE: The addition of the italicized words, in 1980, nullified prior holdings that had limited the immunity to holders of possessory interests, such as *O'Shea v Claude C. Wood Co.* (1979) 97 CA3d 903, 909-910, 159 CR 125 ("license" given to earth removal contractor to stockpile earth on property not an "estate"); *Darr v Lone Star Indus.* (1979) 94 CA3d 895, 900, 157 CR 90 (easement to cross river, granted to private gravel company by state, not an "estate"). See *Ornelas v Randolph* (1993) 4 C4th 1095, 1102, 17 CR2d 594.

The present "exceptionally broad definition" of "any interest" has been applied to immunize anyone who holds only a license to use another's property. See *Hubbard v Brown* (1990) 50 C3d 189, 192, 195, 266 CR 491 (holder of federal grazing permit in national forest had interest in real property); *Colvin v Southern Cal. Edison Co.* (1987) 194 CA3d 1306, 1312, 240 CR 142, disapproved on other grounds at 4 C4th 1108 (utility with license to temporarily locate electric line pole).

On the other hand, someone who is merely a business invitee of the owner does not have an "interest" within §846. *Jensen v Kenneth I. Mullin, Inc.* (1989) 211 CA3d 653, 658, 259 CR 552 (excavation contractors digging percolation test holes for owner).

The holder of a license to use land is entitled to invoke §846 even when the land is publicly owned and open to the public for recreational purposes and the defendant license holder has no right to exclude the plaintiff or others. See *Collins v Tippett* (1984) 156 CA3d 1017, 1020, 203 CR 366 (owner of beach-front property immune from liability to anyone using beach as matter of right under public easement by implied dedication). See also *Charpentier v Von Geldern* (1987) 191 CA3d 101, 111, 236 CR 233 (private owner of land bordering navigable river entitled to invoke §846 against plaintiff who entered land to gain access to river for diving and swimming).

NOTE: Not discussed in *Hubbard v Brown, supra,* is whether immunity may be denied on the ground that the "entry or use" that resulted in the plaintiff's injury was unrelated to the property "interest." In *PG&E v Superior Court* (1983) 145 CA3d 253, 259, 193 CR 336, disapproved on other grounds in *Hubbard v Brown* (1990) 50 C3d 189, 197, 266 CR 491, the plaintiff was sailing his boat on Lake Shasta and was injured when the mast hit power lines overhanging the water. The lake was a navigable waterway held in trust by the state for the public's benefit. The defendant utility owned the land beneath the water and the lines. The court denied immunity not only on the "no interest" ground disapproved in *Hubbard v Brown, supra,* but also on the alternative ground, not expressly disapproved, that the plaintiff did not "enter" or "use" defendant's land, towers, or poles for any recreational (or other) purpose. 145 CA3d at 257. See discussion in *Charpentier v Von Geldern* (1987) 191 CA3d 101, 108, 236 CR 233. The plaintiff in *Hubbard,* who was injured while riding his motorcycle on a Forest Service road when he hit an unmarked barbed wire gate the defendant had strung across the road, appears not to have argued that he was not "using" the defendant's property, which was a permit to graze cattle on the federal land.

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§10.26 (2) Recreational Use or Purpose; Suitability

Under CC §846, "recreational purpose" includes a broad range of activities, such as hiking, fishing, spelunking, parachuting, "nature contacting," recreational gardening, gleaning, and viewing or enjoying scenery. These examples are not exclusive or exhaustive, and the statute also applies to recreational activities involving artificial structures. *Ornelas v Randolph* (1993) 4 C4th 1095, 1101, 17 CR2d 594 (children injured playing on old farm equipment; statute applied whether plaintiff was participant or spectator). See *Jackson v PG&E* (2001) 94 CA4th 1110, 114 CR2d 831 (child injured using aluminum pole to dislodge kite from power lines within utility's easement; see also §7.13).

Whether the plaintiff entered or used the property for recreational purposes may present a question of fact. See *Smith v Scrap Disposal Corp.* (1979) 96 CA3d 525, 528, 158 CR 134 (issue whether plaintiff went on property to dissuade his companions from playing on bulldozer or joined with them in riding it); *Gerkin v Santa Clara Valley Water Dist.* (1979) 95 CA3d 1022, 1027, 157 CR 612, disapproved on other grounds at 33 C3d 707 (question whether plaintiff was "walking" across property or "hiking" for pleasure or exercise; plaintiff's subjective intent is relevant but not controlling).

Ornelas v Randolph (1993) 4 C4th 1095, 1103, 17 CR2d 594, disapproves the view expressed in a series of Court of Appeal decisions that the property had to be "suitable" for a recreational pursuit to qualify for the §846 immunity.

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b. Exceptions to Immunity

§10.27 (1) Consideration; Express Invitation

Civil Code §846 provides that it does not limit the liability of an owner who (1) granted permission to the recreational user for a consideration paid by the user or another (other than any consideration paid to the owner by the state) or (2) expressly invited, rather than merely permitted, the user to enter the premises.

To negate the owner's §846 immunity, the "consideration" must give some immediate and reasonably direct advantage to the owner (such as an entrance fee). See *Miller v Weitzen* (2005) 133 CA4th 732, 736, 35 CR3d 73 (horse owner's payment of dues to riding club that maintained equestrian trail not consideration paid to possessor of driveway easement over county land crossed by trail; see also §10.25).

An "express invitation" must be a direct, personal request from the owner to the injured person. *Johnson v Unocal Corp.* (1993) 21 CA4th 310, 317, 26 CR2d 148 (plaintiff's employer's agreement to indemnify owner against claims and liability arising out of use of property for company picnic was not consideration that negated immunity; giving employer permission to use property was not express invitation to employee). See also *Mansion v U.S.* (9th Cir 1991) 945 F2d 1115, 1118 (indirect benefits to U.S. in allowing picnic at military base did not constitute "consideration"). But see *Ducey v U.S.* (9th Cir 1983) 713 F2d 504, 510 (broader interpretation of Nevada's "consideration" exception; payments to concessionaires for boat slips, trailer spaces, and goods purchases).

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§10.28 (2) Owner's Willful or Malicious Misconduct

Civil Code §846 states that it does not limit the liability for an owner's willful or malicious failure to guard or warn against a dangerous condition, use, structure, or activity. This exception to recreational use immunity does not require proof that the owner's conduct was also malicious in the sense of a subjectively culpable state of mind. *New v Consolidated Rock Prods. Co.* (1985) 171 CA3d 681, 691, 217 CR 522. Rather, the definition of "willful misconduct" that has been applied is: Intentional wrongful conduct, done either with knowledge that serious injury to another will probably result, or with wanton and reckless disregard of the possible results. See 171 CA3d at 688 (jury instruction upheld, including statement of reasonable man standard on recognition of danger). See *O'Shea v Claude C. Wood Co.* (1979) 97 CA3d 903, 912, 159 CR 125; *Lostritto v Southern Pac. Transp. Co.* (1977) 73 CA3d 737, 744, 140 CR 905.

A critical element is the defendant's knowledge of the condition, use, or activity that led to the danger. Willful misconduct may present a question of fact if evidence exists of such knowledge. See *New v Consolidated Rock Prods. Co., supra* (plaintiffs rode motorcycles over 20-foot cliff at defendant's gravel quarry; motorcyclists habitually used property; conflicting evidence of defendant's precautions); *Lostritto v Southern Pac. Transp. Co., supra* (diving into river from defendant's trestle). The willful misconduct exception does not apply when defendant's knowledge is not shown. See *Charpentier v Von Geldern* (1987) 191 CA3d 101, 113, 236 CR 233 (swimmer injured diving into river from bank); *O'Shea v Claude C. Wood Co.* (1979) 97 CA3d 903, 913, 159 CR 125 (motorcyclist injured while riding in area where dirt was stockpiled).

Intentional wrongful conduct may be negated by evidence that the defendant took protective measures, even if the protective devices were negligently maintained. See *Bacon v Southern Cal. Edison Co.* (1997) 53 CA4th 854, 859, 62 CR2d 16 (negligent maintenance of protective barbed wire and warning sign at electrical transmission tower was insufficient to show willful or malicious conduct; see also §7.2).

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§10.29 4. Resort, Amusement Place, and Swimming Pool Users

The proprietor of a resort or other place of amusement to which the public is invited for a charge is required to (a) maintain the premises and contrivances in a reasonably safe condition, (b) use due care in operating devices and in inspecting and supervising the area, and (c) take reasonable precautions to prevent injury to patrons using the facilities. *Sorensen v Hutson* (1959) 175 CA2d 817, 826, 346 P2d 785, 789 (water skiing and swimming facilities; duty to supervise to protect patrons from others' wrongful conduct); *Davidson v Long Beach Pleasure Pier Co.* (1950) 99 CA2d 384, 387, 221 P2d 1005, 1007 (roller coaster); *Chardon v Alameda Park Co.* (1934) 1 CA2d 18, 36 P2d 136 (slide at amusement park; owner must use ordinary care to see that all devices are properly constructed and maintained, and are operated by competent and skilled agents). See Annos, 55 ALR5th 463 (1998) (swimming pool at hotel, motel, or resort), 38 ALR5th 107 (1996) (skating rink), 8 ALR3d 675, 678 (1966) (water skiing), 94 ALR2d 1431, 1437 (1964) (winter sports), 87 ALR2d 1179, 1182 (1963) (horse or dog track), 69 ALR2d 1067, 1071 (1960) (slide or chute), 67 ALR2d 965, 966 (1959) (picnic grounds), 48 ALR2d 104, 111 (1954) (bathing resort), 37 ALR2d 391, 393 (1954) (auto racetrack).

The duty extends to

- the entire area of the invitation, including any public waters or property over which the proprietor exercises control (*Sorensen v Hutson, supra* (boat launching in bay); see Anno, 48 ALR2d 104, 108 (1956) (bathing resort)), except for hazards of the open ocean over which the proprietor has no control (*Princess Hotels Int'l v Superior Court* (1995) 33 CA4th 645, 652, 39 CR2d 457, disapproved on other grounds at 14 C4th 1166 (hotel guests swimming in ocean adjacent to their Acapulco hotel); *Swann v Olivier* (1994) 22 CA4th 1324, 1330, 28 CR2d 23, disapproved on other grounds at 14 C4th 1166 (no duty to warn of dangerous condition of ocean beyond defendants' private beach); see §10.13); and
- dangerous natural conditions (*Gates v Gautier* (1938) 29 CA2d 524, 525, 85 P2d 141, 142 (underwater rocks in lake)) of which the proprietor must at least warn (*Larson v Santa Clara Valley Water Conserv. Dist.* (1963) 218 CA2d 515, 522, 32 CR 875, 878 (lake too shallow for water skiing)).

The proprietor's duties are nondelegable; the proprietor is liable for injuries to patrons from negligence of an independent contractor or concessionaire. *McCordic v Crawford* (1943) 23 C2d 1, 6, 142 P2d 7, 10 (amusement rides); *Basye v Craft's Golden State Shows* (1941) 43 CA2d 782, 788, 111 P2d 746, 750 (shooting gallery).

Anyone who owns or operates a swimming pool that is open to the public must conform both to the general duty of care and to statutory requirements. See Health & S C §§116025-116068. See Annos, 87 ALR3d 1032 (1978) (lack of supervision), 87 ALR3d 886 (1978) (inadequate fencing), 87 ALR3d 380 (1978) (lack of rescue equipment).

A swimming pool owner's violation of a statute or a regulation may give rise to a presumption of negligence (see §1.31) and may shift to the owner the burden of proving that the violation was not the proximate cause of the injury or death. See *Haft v Lone Palm Hotel* (1970) 3 C3d 756, 765, 91 CR 745, 749. The burden shifts to the owner if there is a substantial probability that the owner's negligence caused the injury or death and the owner's failure to conform to the safety regulation made it more difficult for the plaintiff to establish proximate cause, even if the plaintiff was negligent. See *Smith v Americania Motor Lodge* (1974) 39 CA3d 1, 113 CR 771 (10- and 11-year-old decedents used defendant's pool although they could not swim and had been forbidden to go there by parents; absence of safety rope). See also *Atkins v Bisigier* (1971) 16 CA3d 414, 421, 94 CR 49 (regulation requiring rope to divide deep from shallow end of swimming pool was intended to prevent drowning and could not be invoked by someone injured by diving into shallow end). But see *Andres v Young Men's Christian Ass'n* (1998) 64 CA4th 85, 74 CR2d 788 (statute requiring lifeguard, or "no lifeguard" sign, at swimming pools did not apply to 8¢ × 7¢ spa pool in shower room; see also §1.31).

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III. LANDLORDS' LIABILITY TO TENANTS AND THEIR GUESTS

§10.30 A. Ordinary Care Standard (*Rowland v Christian*)

A landlord's liability to tenants is based on the general rule stated in CC §1714(a) and *Rowland v Christian* (1968) 69 C2d 108, 119, 70 CR 97, 104, that every person is responsible for injuries caused by his or her failure to use ordinary care or skill in the management of his or her property or person (see §10.3). *Barnes v Black* (1999) 71 CA4th 1473, 84 CR2d 634 (*Rowland* factors determine scope of duty whether risk of harm is situated on-site or off-site; see §10.33); *Brennan v Cockrell Invs.* (1973) 35 CA3d 796, 111 CR 122. Thus, ordinary negligence rules apply to damages actions against landlords by tenants and their guests. See *Amos v Alpha Prop. Mgmt.* (1999) 73 CA4th 895, 898, 87 CR2d 34 (apartment building owner's duty includes adopting reasonable precautions to prevent young children from toppling out of windows in common areas; see §10.38). *Lopez v Superior Court* (1996) 45 CA4th 705, 715, 52 CR2d 821 (yearly lease of farm land with produce stand where patron slipped on smashed grapes on concrete floor); *Portillo v Aiassa* (1994) 27 CA4th 1128, 1133, 32 CR2d 755 (commercial lease); *Evans v Thomason* (1977) 72 CA3d 978, 984, 140 CR 525. See also *Wilks v Hom* (1992) 2 CA4th 1264, 1271, 3 CR2d 803 (liability for emotional distress of mother of children injured in explosion and fire in rented house). See Anno, 62 ALR5th 475 (1998) (landlord's liability for swimming pool death).

NOTE: Before *Rowland v Christian, supra,* was applied to landlords, it was the traditional, or common law, rule that a landlord was not liable to a tenant or tenant's guest for defective conditions of the rented or leased house or apartment in the absence of (1) concealment of a known danger, (2) an express covenant to repair or a promise to repair supported by consideration, or (3) a statutory duty to repair. See *Del Pino v Gualtieri* (1968) 265 CA2d 912, 919, 71 CR 716, 721. It was said that a tenant or his guest could not be an invitee of a landlord out of possession (*Hardin v Elvitsky* (1965) 232 CA2d 357, 369, 42 CR 748, 753) except for portions of the premises retained under the landlord's control (*Sockett v Gottlieb* (1960) 187 CA2d 760, 766, 9 CR 831, 834). See §10.33 on present significance of possession and control. Several exceptions to the former general rule of nonliability had developed over the years. Cases discussing these exceptions may still prove useful in expressing duties that apply in particular situations. See §§10.32-10.38.

The proprietor of a hotel or similar lodging house has traditionally owed to guests the duty to maintain the premises, including rooms and appliances, in a reasonably safe condition. *Stowe v Fritzie Hotels, Inc.* (1955) 44 C2d 416, 420, 282 P2d 890, 892. The distinction was based in part on the tenant's right to exclusive legal possession compared with the hotel lodger's right only to use the premises subject to the innkeeper's retention of control and access. 44 C2d 421, 282 P2d 893. As to an innkeeper's liability for loss of a guest's personal possessions, see *Taylor v Forte Hotels Int'l* (1991) 235 CA3d 1119, 1125, 1 CR2d 189, applying CC §1859. See also Annos, 55 ALR5th 463 (1998) (hotel, motel, or resort owner's liability for swimming pool death), 28 ALR4th 120 (1984) (hotel or motel owner's liability for guest's loss of property by theft), 91 ALR3d 483 (1979) (hotel or motel operator's liability for furniture defects).

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§10.31 B. Role of Strict Product Liability

Neither landlords nor hotel proprietors are strictly liable on a products liability theory for injuries to their respective tenants and guests caused by a defect in the premises. *Peterson v Superior Court* (1995) 10 C4th 1185, 1188, 43 CR2d 836 (plaintiff fell in hotel bathtub). See *McCarthy v Martinson* (1996) 51 CA4th 632, 59 CR2d 149 (*Peterson* holding applies retroactively). Hotel proprietors or landlords who breach the applicable standard of care remain liable under general tort principles (see §10.30) for injuries resulting from defects in their premises. In addition, the injured tenant or guest retains any strict product liability cause of action that may lie against the manufacturer, distributor, or retailer of a defective product that causes injury. 10 C4th at 1189, 1210.

NOTE: *Peterson* overrules *Becker v IRM Corp.* (1985) 38 C3d 454, 464, 213 CR 213, which held that a landlord engaged in the business of leasing dwellings is strictly liable for injuries resulting from a latent defect when that defect (untempered glass shower door) existed at the time the premises were let. *Peterson* does not decide whether the result would be different if the landlord or hotel owner had participated in the construction of the building but notes that in such circumstances strict liability would attach, if at all, based on the landlord's status as a builder in the business of constructing rental properties. 10 C4th at 1200.

Peterson reaffirms (10 C4th at 1204) the implied warranty of habitability in a residential lease (see *Green v Superior Court* (1974) 10 C3d 616, 619, 111 CR 704) but holds that the implied warranty does not support strict liability based on defects unknown to the landlord and that would not have been disclosed by reasonable inspection. *Peterson* also reaffirms (10 C4th at 1206) the special relationship between hotel proprietors and their guests under which a hotel guest can reasonably expect that the hotel owner will diligently inspect the hotel room for defects and will correct any defects found.

Before *Peterson* it was held that the *Becker* rule of strict liability was limited to residential premises and did not apply to commercial property. *Ernest W. Hahn, Inc. v Superior Court* (1991) 1 CA4th 1448, 1452, 3 CR2d 502 (customers injured when tree fell on them in marketplace plaza); *Muro v Superior Court* (1986) 184 CA3d 1089, 1093, 1098, 229 CR 383 (employee of commercial tenant fell on stairs between floors); see *Pierson v Sharp Mem. Hosp.* (1989) 216 CA3d 340, 346, 264 CR 673 (hospital not strictly liable for injury to hospital visitor from latent defects in hospital room).

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C. Particular Situations

§10.32 1. Rental for Public Purpose

Under previously applicable restrictions on a landlord's liability to a tenant (see §10.30), the fact that a landlord had rented or leased property for a purpose involving admission of the public provided an exception; such a landlord had a duty to see that the premises were reasonably safe for their intended purpose and a duty to use ordinary care to inspect and repair the property before transferring possession. *Hayes v Richfield Oil Corp.* (1952) 38 C2d 375, 380, 240 P2d 580 (service station); *Rau v Redwood City Women's Club* (1952) 111 CA2d 546, 549, 245 P2d 12, 14 (auditorium); see Restatement (Second) of Torts §359 (1965).

Under currently applicable principles (see §10.30), the fact that a lease was made for a public purpose may be considered in determining whether a landlord used ordinary care and skill under the circumstances in managing the property. *Portillo v Aiassa* (1994) 27 CA4th 1128, 1134, 32 CR2d 755. See *Camacho v Du Sung Corp.* (9th Cir 1997) 121 F3d 1315, 1317 (lease of space to gun club). The duty to use reasonable care to inspect and repair the premises before transferring possession includes a duty to do so when the lease is renewed or the premises relet. *Portillo v Aiassa, supra*. See *Burroughs v Ben's Auto Park, Inc.* (1945) 27 C2d 449, 453, 164 P2d 897.

Cases decided under the former principles held that a large number of patrons was not essential to a public purpose lease, but a rental for the exclusive use of a private group was not included. *Allen v Paradise Grange No. 490,* Inc. (1958) 159 CA2d 247, 249, 323 P2d 468. See Anno, 17 ALR3d 873, 885 (1968). A public lessor was not responsible for defects in the lessee's personal property or for the tenant's negligence in managing such chattels (*Goodman v Harris* (1953) 40 C2d 254, 265, 253 P2d 447 (gas heater)) unless a statute or an ordinance imposed this duty on the owner (see *Finnegan v Royal Realty Co.* (1950) 35 C2d 409, 423, 218 P2d 17 (fire escape)).

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§10.33 2. Area Under Landlord's Control

Under *Rowland v Christian* (see §10.30), the extent of the landlord's control of the property where the injury occurred is a circumstance to consider in determining whether the landlord acted reasonably toward the tenant. *Barnes v Black* (1999) 71 CA4th 1473, 84 CR2d 634 (apartment complex owner could be liable for injury to and death of child who was riding "big wheel" on sidewalk near play area and went down steep driveway into busy street; sidewalk, play area, and driveway were all within complex's grounds). See *Brennan v Cockrell Invs.* (1973) 35 CA3d 796, 800, 111 CR 122.

For example, a landlord who exercises control over land adjacent to the landlord's property can be liable for negligently failing to protect a tenant from a hazard on that adjacent property. See *Alcarez v Vece* (1997) 14 C4th 1149, 60 CR2d 448 (triable issue of fact whether apartment house owner exercised sufficient control over adjacent city-owned strip between sidewalk and street, not noticeably separate from landlord's property, in which was embedded water meter box with broken or missing cover; landlord could be liable for failing to correct hazard or warn tenant of it).

Similarly, a landlord's negligent management of a common area can make the landlord liable for an injury that occurred in a tenant's private area. *Birke v Oakwood Worldwide* (2009) 169 CA4th 1540, 87 CR3d 602 (landlord's failure to control smoking in apartment complex common areas could be breach of duty to maintain premises in safe condition leading to private action for public nuisance); *O'Hara v Western Seven Trees Corp.* (1977) 75 CA3d 798, 803, 142 CR 487 (failure to safeguard common areas contributed to rapist's entry into tenant's apartment; see §10.38).

Generally, a landlord has no duty (1) to protect against dangerous conditions or activities off the premises over which he has no control or (2) to erect fences or barricades to prevent residents from encountering such dangers. See *Rosenbaum v Security Pac. Corp*. (1996) 43 CA4th 1084, 1093, 50 CR2d 917 (landlord not liable for attack on tenant on street in front of apartment building; inadequate lighting in apartment garage, inducing plaintiff to park on street, not cause of attack); *Brooks v Eugene Burger Mmgt. Co.* (1989) 215 CA3d 1611, 1624, 264 CR 756 (minor resident walked out of unfenced apartment complex and was hit by vehicle while crossing adjacent busy street; see §10.40); *Wylie v Gresch* (1987) 191 CA3d 412, 419, 236 CR 552 (no duty to warn prospective tenant of vicious dog in neighborhood; see §§3.15-3.16 on liability for injuries caused by animals). A landlord who actually erects such a fence, however, thereby creating a deceptive appearance of safety for minor residents, must maintain the fence in good condition. See *McDaniel v Sunset Manor Co.* (1990) 220 CA3d 1, 10, 269 CR 196 (tenants' child almost drowned in adjacent creek after going through gap in boundary fence).

Rowland v Christian principles (see §10.30) thus modify the traditional rule that a landlord was liable only for injuries to tenants or their guests caused by a dangerous condition (a) on a part of the premises that was under the landlord's control (*Johnston v De La Guerra Props.* (1946) 28 C2d 394, 399, 170 P2d 5, 7), and (b) of which the landlord knew or should have known (*Harris v Joffe* (1946) 28 C2d 418, 424, 170 P2d 454, 458). Even under the traditional rule, areas deemed to be under the landlord's control included stairways and other areas provided for

- the joint use of tenants (*Di Mare v Cresci* (1962) 58 C2d 292, 297, 23 CR 772, 775 (common stairway); *Sockett v Gottlieb* (1960) 187 CA2d 760, 766, 9 CR 831, 834 (walkway); see Anno, 95 ALR2d 1341, 1344 (1964) (shopping center walkways)), or
- the use of a single tenant (*Burks v Blackman* (1959) 52 C2d 715, 718, 344 P2d 301, 304 (rear porch); *Hardin v Elvitsky* (1965) 232 CA2d 357, 367, 42 CR 748, 752 (stairs to duplex); *Schumann v C.R. Reichel Eng'g Co.* (1960) 187 CA2d 309, 314, 9 CR 486, 489 (exterior platform)).

On a landlord's responsibility for the structural parts of the building, see *Poulsen v Charlton* (1964) 224 CA2d 262, 268, 36 CR 347, 350 (roof); *Both v Harband* (1958) 164 CA2d 743, 745, 331 P2d 140, 142 (exterior walls).

The landlord's duty to maintain areas under his control is nondelegable; the landlord is liable for negligence of an independent contractor hired to maintain those areas. *Finnegan v Royal Realty Co.* (1950) 35 C2d 409, 432, 218 P2d 17, 30 (fire escape); *Brown v George Pepperdine Found.* (1943) 23 C2d 256, 259, 143 P2d 929, 930 (elevator); *Srithong v Total Investment Co.* (1994) 23 CA4th 721, 726, 28 CR2d 672 (roof; noted in §10.15); *Poulsen v Charlton, supra* (roof).

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§10.34 3. Condominiums and Common Interest Developments

A condominium homeowners' association functions as a landlord with respect to maintaining the common areas of the complex and, as such, the association has a duty to use due care for the residents' safety in the areas under the association's control. *Frances T. v Village Green Owners Ass'n* (1986) 42 C3d 490, 499, 229 CR 456 (liability for injuries to unit owner attacked in her unit). Under the definitions in CC §1351, the same status and duty should apply to other forms of common interest developments. But see *Pamela W. v Millsom* (1994) 25 CA4th 950, 30 CR2d 690 (liability of association rejected without discussion of its status).

The liability of individual condominium association board members recognized in *Frances T.* was limited by the 1988 enactment of CC §1365.7(a), which provides that a volunteer officer or director of such an association shall not be personally liable in excess of specified liability insurance coverage maintained by the association to anyone who suffers injury or damage as a result of the tortious act or omission of the officer or director if the act or omission (1) was performed within the scope of association duties, (2) was performed in good faith, and (3) was not willful, wanton, or grossly negligent. See CC §1365.7(f), added in 1996, expanding the scope of board members' duties.

Under CC §1365.9, the individual owners of separate interests in common interest developments that have common areas owned in tenancy-in-common are protected from individual liability as owners, and any cause of action lies only against the association, if the association meets specified insurance requirements. Section 1365.9 supersedes the liability permitted by the holding in *Ruoff v Harbor Creek Community Ass'n* (1992) 10 CA4th 1624, 1629, 13 CR2d 755, which held that CC §1365.7 did not grant immunity to individual owners of condominium units.

See *Chee v Amanda Goldt Prop. Mgmt.* (2006) 143 CA4th 1360, 50 CR3d 40, in §3.15 on the liability, under declarations of covenants, conditions, and restrictions, of an association and a manager to an owner knocked down by another tenant's allegedly dangerous dog.

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§10.35 4. Dangerous Condition Known to Landlord

Even before the adoption of currently applied principles (see §10.30), a landlord was liable for injuries to tenants or their guests caused by an existing latent defect in the leased or rented premises not disclosed to the tenant, at least when the defendant knew of the defect (*Shotwell v Bloom* (1943) 60 CA2d 303, 309, 140 P2d 728, 732), and possibly when reasonable inspection would have revealed it (see *McNally v Ward* (1961) 192 CA2d 871, 878, 14 CR 260, 264; *Black v Partridge* (1953) 115 CA2d 639, 645, 252 P2d 760, 763). See Restatement (Second) of Torts §358 (1965); Anno, 88 ALR2d 586, 591 (1963). See also *O'Hara v Western Seven Trees Corp.* (1977) 75 CA3d 798, 804, 142 CR 487 (failure to warn prospective tenant of previous criminal attacks on other apartment house tenants).

Formerly, there was ordinarily no duty to warn of obvious or patent defects or dangers. *Hanson v Luft* (1962) 58 C2d 443, 445, 24 CR 681, 682 (open gas heater). However, a defect was considered latent, and the landlord had a duty to warn of it, if either its presence or its dangerous nature was not apparent. *Merrill v Buck* (1962) 58 C2d 552, 558, 25 CR 456, 459. See Anno, 19 ALR5th 405 (1994) (landlord's liability when tenant's child dies from lead paint poisoning).

A landlord is not liable for injury to a tenant's employee resulting from a dangerous condition created by work methods employed by the tenant. See *Laico v Chevron U.S.A., Inc.* (2004) 123 CA4th 649, 659, 20 CR3d 307 (also noted in §§1.6, 6.8).

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§10.36 5. Duty or Undertaking to Repair

Under currently applicable principles (see §10.30), landlords have a duty to residential property tenants to use ordinary care to make repairs to the leased or rented premises to keep them reasonably safe and habitable. For breach of that duty, a tenant is not limited to the remedies in CC §§1941-1942.5; rather, the landlord is subject to tort liability for damages on various grounds, including breach of the warranty of habitability, negligence, nuisance, and intentional infliction of emotional distress. *Stoiber v Honeychuck* (1980) 101 CA3d 903, 918-926, 162 CR 194 (alleged numerous defects that rendered premises uninhabitable); *Evans v Thomason* (1977) 72 CA3d 978, 985, 140 CR 525 (landlord knew that electrical outlet was defective and that tenants would certainly overload only other outlet).

The landlord's duty to provide reasonable safety and habitability covers areas under the landlord's control (see §10.33), conditions that existed before the tenant took possession (see *Brantley v Pisaro* (1996) 42 CA4th 1591, 1605, 50 CR2d 431; *Brennan v Cockrell Invs.* (1973) 35 CA3d 796, 111 CR 122), and conditions that are made known to the landlord during the tenancy (see *Stoiber v Honeychuck, supra; Evans v Thomason, supra*). Further, rental agents may be liable for negligence (but not for breach of warranty of habitability) for failing to make repairs after notice of the defects. *Stoiber v Honeychuck* (1980) 101 CA3d 903, 930-931, 162 CR 194.

NOTE: Liability under *Stoiber v Honeychuck, supra,* applies only to landlords of residential property and has no application to commercial leases. *Butler-Rupp v Lourdeaux* (2005) 134 CA4th 1220, 1227, 36 CR3d 685 (business tenant could not recover emotional distress damages from landlord who failed to make promised repairs).

Under previously applicable principles (see §10.30), liability based on a covenant to repair was limited to obligations enforceable under contract law. *Green v Del-Camp Invs.* (1961) 193 CA2d 479, 482, 14 CR 420, 422. But see *Stowe v Fritzie Hotels, Inc.* (1955) 44 C2d 416, 423, 282 P2d 890, 894 (express warranty liability). Even then, the landlord was liable only after notice and a reasonable opportunity to repair. *McNally v Ward* (1961) 192 CA2d 871, 884, 14 CR 260, 268.

A landlord who undertakes repairs must use ordinary care, regardless of whether the landlord in the particular situation was obligated to make repairs. *Minoletti v Sabini* (1972) 27 CA3d 321, 324, 103 CR 528 (landlord failed to repair window for 1 month after notice of its defective condition (see CC §1942) and failed to warn tenant after beginning repair that window remained in dangerous condition). See also *Black v Partridge* (1953) 115 CA2d 639, 645, 252 P2d 760, 763. Similarly, a landlord may have a duty to maintain a boundary fence to protect tenants' children from dangers on adjacent property, even though the landlord had no duty to erect the fence, if the fence gives tenants a deceptive sense of security. See *McDaniel v Sunset Manor Co.* (1990) 220 CA3d 1, 8, 269 CR 196. See also §10.33.

Further, a landlord is liable for injuries caused by the negligence of someone hired to make a repair or installation on leased premises even if that person is an independent contractor. See *Golden v Conway* (1976) 55 CA3d 948, 958, 128 CR 69 (installation of heater); §10.15.

The independent contractor that makes a repair, on the other hand, owes no duty to warn a tenant of design defects or safety hazards if the defect or hazard is not related to its repair work. *Seo v All-Makes Overhead Doors* (2002) 97 CA4th 1193, 119 CR2d 160 (defectively designed remote-controlled sliding gate).

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§10.37 6. Duties Imposed by Statute or Ordinance

Statutes and ordinances, including building codes, may create a landlord's duty of repair, maintenance, or alteration. *Stoiber v Honeychuck* (1980) 101 CA3d 903, 924, 162 CR 194 (duty to render and maintain habitable residential premises under CC §1941); *Ewing v Balan* (1959) 168 CA2d 619, 621, 336 P2d 561, 563 (gas water heater); *Black v Partridge* (1953) 115 CA2d 639, 645, 252 P2d 760 (gas appliances); see CC §1941.1 (standards of tenantability). The law must be applicable to the particular structure, however. Compare *Merrill v Buck* (1962) 58 C2d 552, 558, 25 CR 456, 460 (retroactive building code), with *Del Pino v Gualtieri* (1968) 265 CA2d 912, 916, 71 CR 716, 718 (not retroactive). See *Salinero v Pon* (1981) 124 CA3d 120, 132, 177 CR 204 (injury to window washer; building code not in effect when building permit issued). On the presumption of negligence for violation of a statute, see *Stoiber v Honeychuck, supra,* and §1.31.

The primary duty to comply with building safety laws rests on the landlord (*Finnegan v Royal Realty Co.* (1950) 35 C2d 409, 423, 218 P2d 17, 26. See *Gordon v Strawther* (1969) 273 CA2d 504, 514, 78 CR 417, 424 (legal and equitable owners). The duty includes making any structural changes necessary for compliance. *Grant v Hipsher* (1967) 257 CA2d 375, 381, 64 CR 892, 897. The responsibility cannot be delegated to tenants or contractors. *Finnegan v Royal Realty Co.* (1950) 35 C2d 409, 433, 218 P2d 17, 31.

A statutory duty to maintain the premises requires the landlord to make reasonable inspections of the portions under his control. *McNally v Ward* (1961) 192 CA2d 871, 878, 14 CR 260, 265. However, a landlord is entitled to notice and a reasonable opportunity to repair a tenant's private quarters. *Morris v Olney* (1963) 217 CA2d 864, 873, 32 CR 88, 92.

On the application of the Fair Employment and Housing Act (FEHA) (Govt C §§12900-12995), see *Brown v Smith* (1997) 55 CA4th 767, 774, 64 CR2d 301 (FEHA applies to sexual harassment of tenant).

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Source: Torts/California Tort Guide/10 Premises Liability/§10.38 7. Tenants' and Others' Activities

§10.38 7. Tenants' and Others' Activities

Generally, landlords are not liable for injuries to tenants or their guests caused by other tenants' acts. See *Goodman v Harris* (1953) 40 C2d 254, 265, 253 P2d 447, 454 (injury caused by tenant-installed heater); *Schwartz v McGraw-Edison Co.* (1971) 14 CA3d 767, 782, 92 CR 776, disapproved on other grounds at 19 C3d 34 (portable heater).

But a landlord can be liable for a foreseeable assault on one tenant by another. See *Barber v Chang* (2007) 151 CA4th 1456, 60 CR3d 760 (landlord had duty to undertake at least minimally burdensome steps to alleviate risk posed by violent tenant); *Madhani v Cooper* (2003) 106 CA4th 412, 130 CR2d 778 (injured tenant had complained to landlord on other occasions about other tenant's verbal and physical attacks; landlord promised to take corrective steps but did not).

Landlords are not ordinarily liable for injuries resulting from actions of tenants' guests. *Anaya v Turk* (1984) 151 CA3d 1092, 1099, 199 CR 187. See *Baldwin v Zoradi* (1981) 123 CA3d 275, 285, 176 CR 809 (drunk driving; university not liable for failing to prevent on-campus drinking by students holding "room license").

Landlords are not ordinarily liable for injuries to child tenants who fall out of unscreened windows. *Pineda v Ennabe* (1998) 61 CA4th 1403, 72 CR2d 206 (applying *Rowland* factors (see §§1.7, 10.30), court held that landlord had no duty to prevent 5-year-old's fall from screened second-floor window; parents had placed bed next to window and had not kept child from bouncing on it). But see *Amos v Alpha Prop. Mgmt.* (1999) 73 CA4th 895, 900, 87 CR2d 34 (owner/manager of apartment building can be liable for maintaining low, open, unprotected hallway window on second floor where young children were likely to play and from which 2½-year-old fell).

NOTE: The supreme court declined to review, but depublished, a court of appeal ruling that a landlord who covenants or undertakes to replace a window screen but fails to do so can be liable for injury to a child who falls from the window. See *White v Contreras* (review denied and ordered not published May 1, 2002, S104555; uncitable court of appeal opinion at 95 CA4th 137 (advance reports), 115 CR2d 299).

A landlord can be liable for a lack of care in responding to conditions caused by tenants. See *Lee v Ashizawa* (1964) 60 C2d 862, 866, 37 CR 71, 73 (permitting oil to remain on sidewalk); *Reyes v Koska* (1998) 65 CA4th 451, 458, 76 CR2d 457 (farm operators who permitted migrant workers to build and live rent-free in wood and cardboard shacks could be liable for fire-caused death and injury under general negligence principles and for violating the Employee Housing Act (Health & S C §§17000-17011)). See §§3.15-3.16 on landlord's liability for injuries caused by tenant's dog.

Whether a landlord is liable for injuries caused by a tenant's discharge of firearms depends on factors of foreseeability and power to control the tenant. Compare *Sturgeon v Curnutt* (1994) 29 CA4th 301, 307, 34 CR2d 498 (landlords not liable to visitor who was shot by tenant (landlords' son) who was known to abuse alcohol; no evidence of prior incidents), with *Rosales v Stewart* (1980) 113 CA3d 130, 135, 169 CR 660 (allegations that tenant occasionally discharged firearm in back yard; duty could be based on landlord's ability to control conduct by terminating tenancy). See *Camacho v Du Sung Corp.* (9th Cir 1997) 121 F3d 1315, 1318 (gun club kept loaded gun in display case; landlord not liable for accidental firing by tenant's guest).

A landlord's liability for injuries to tenants or guests caused by criminal acts of third persons is tested by the same factors that apply to other property owners or occupants (see §10.7), subject to special consideration of the landlord's limited control of the premises. See *Ann M. v Pacific Plaza Shopping Ctr.* (1993) 6 C4th 666, 676, 25 CR2d 137 (commercial landlord not liable for criminal assault on lessee's employee; such conduct not foreseeable absent prior similar incidents or other special circumstances). See also *Castaneda v Olsher* (2007) 41 C4th 1205, 1213, 63 CR3d 99 (landlords, including mobile home park owners, ordinarily have no duty to (1) reject prospective tenants they have reason to believe are gang members, (2) evict a tenant whose gang affiliation becomes known, or (3) absent specific prior incidents, employ security guards or increase lighting); *Pamela W. v Millsom* (1994) 25 CA4th 950, 959, 30 CR2d 690 (neither plaintiff's landlords nor condominium association governing four-unit complex liable for assault on tenant in her leased unit; defendants knew of no prior criminal acts in vicinity except one daytime burglary; evidence that complex was in high crime area insufficient); *Leslie G. v Perry & Assocs.* (1996) 43 CA4th 472, 488, 50 CR2d 785 (broken security gate not shown to be a cause of rape of tenant in apartment garage); *Rotman v Maclin Mkts.* (1994)

24 CA4th 1709, 30 CR2d 130 (commercial landlord at flea market not liable for theft from jewelry vendor absent agreement to provide security); *Riley v Marcus* (1981) 125 CA3d 103, 109 n2, 177 CR 827 (landlord not liable for attack on tenant; no prior similar incidents); *7735 Hollywood Blvd. Venture v Superior Court* (1981) 116 CA3d 901, 905, 172 CR 528 (no liability for intruder's rape of tenant in her apartment; knowledge of burglary and rape in "general area" and failure to replace light outside apartment deemed insufficient); *Totten v More Oakland Residential Hous.* (1976) 63 CA3d 538, 543, 134 CR 29 (visitor hit by stray bullet in fight between other visitors); *Jubert v Shalom Realty* (1982) 135 CA3d Supp 1, 6, 185 CR 641 (no duty to secure parking area to protect tenant's car from vandals).

A landlord may, however, be liable for injuries to tenants by criminal assaults when they are committed in common areas and the landlord had notice of prior criminal activity on the premises. See *Frances T. v Village Green Owners Ass'n* (1986) 42 C3d 490, 499, 503, 229 CR 456 (condominium association subject to liability for attack on plaintiff in her unit; association failed to install sufficient exterior lighting and required plaintiff to remove additional lighting she had installed; project had been subject to an "exceptional crime wave," including car thefts, purse snatchings, burglaries, and robberies; plaintiff's own unit had been burglarized); *Penner v Falk* (1984) 153 CA3d 858, 866-867, 200 CR 661 (tenant assaulted in common hallway of apartment building; allegations of inadequate gates, doors, locks, lighting; notice of prior violent crimes on premises and in apartments); *Kwaitkowski v Superior Trading Co.* (1981) 123 CA3d 324, 328, 176 CR 494 (negligence in failing to protect tenant from assault in dimly lit lobby of apartment building; prior complaints by tenants and prior assault on tenant; defective lock on lobby entrance door); *O'Hara v Western Seven Trees Corp.* (1977) 75 CA3d 798, 802-803, 142 CR 487 (landlords knew that man had raped several tenants).

See Annos, 17 ALR6th 453 (2006) (hotel or motel operator's liability to guest assaulted by third party), 43 ALR5th 207 (1996) (landlord's liability to protect tenant from others' criminal acts).

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§10.39 IV. TENANTS' DUTIES TO LANDLORDS AND OTHER TENANTS

A tenant is liable to the landlord, and to other tenants, for property damage caused by the tenant's negligence, or by an unsafe condition created by an independent contractor hired by the tenant. *Pappas v Carson* (1975) 50 CA3d 261, 123 CR 343 (tenant liable for fire damage caused either by overloading electrical circuit or by faulty installation of circuit by tenant's contractor; res ipsa loquitur instruction was proper). See also *Golden v Conway* (1976) 55 CA3d 948, 963, 128 CR 69 (tenant allegedly left combustible material too close to wall heater). See Restatement (Second) of Torts §422 (1965).

On a tenant's duty to protect his guest from attack by another guest, see *Anaya v Turk* (1984) 151 CA3d 1092, 1101, 199 CR 187 (no liability for failure to intervene in attack; possible liability for conducting illegal drug business in apartment).

See Annos, 11 ALR4th 579 (1982) (lessee's liability after vacating premises), 4 ALR4th 798 (1981) (tenant's agreement to indemnify landlord), 44 ALR3d 943 (1972) (tenant's obligation under lease to third persons).

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V. INJURIES ON PUBLIC SIDEWALKS OR STREETS

A. Adjacent Owners' Liability

§10.40 1. Sidewalk Defects

A property owner is not ordinarily liable for injuries that occur on an adjacent public street. See *Lompoc Unif. Sch. Dist. v Superior Court* (1993) 20 CA4th 1688, 1698, 26 CR2d 122 (owner not required to maintain a "distraction barrier" that would prevent passing vehicle operators from being distracted by activities on the property). See also §10.13 (extent of premises for which owner is liable). See, however, *Alcarez v Vece* (1997) 14 C4th 1149, 60 CR2d 448, noted in §10.33 (areas under landlord's control). See also *Contreras v Anderson* (1997) 59 CA4th 188, 69 CR2d 69 (property owner's simple maintenance of adjoining city-owned strip not an exercise of control).

Similarly, the owner of land abutting a public sidewalk owes no duty to the public to maintain the sidewalk. *Winston v Hansell* (1958) 160 CA2d 570, 572, 325 P2d 569, 570. An abutting owner that is sued may also claim defenses, such as the "trivial defect" doctrine, that are available to the public entity responsible for the sidewalk. *Caloroso v Hathaway* (2004) 122 CA4th 922, 19 CR3d 254 (court found that seven-sixteenths of an inch elevation difference was trivial after excluding civil engineer's expert opinion that it was not). *Lynch v U.S.* (D AZ 2008) 2008 US Dist Lexis 70551 (one-inch depression beside paved trail in Muir Woods trivial as matter of law for purposes of Govt C §830.2). See §8.20. See also Anno, 88 ALR2d 331, 340 (1963). However, allegations that the owner planted trees and other vegetation on both sides of a sidewalk and that roots from such a tree had created the crack on which the plaintiff tripped stated a cause of action. *Alpert v Villa Romano Homeowners Ass'n* (2000) 81 CA4th 1320, 96 CR2d 364. See *Moeller v Fleming* (1982) 136 CA3d 241, 244, 186 CR 24 (break in sidewalk caused by roots of tree on defendant's property). But see *Williams v Foster* (1989) 216 CA3d 510, 522, 265 CR 15 (no evidence that defendant's trees caused sidewalk defect); *Jones v Deeter* (1984) 152 CA3d 798, 803, 199 CR 825 (owner not liable for sidewalk break caused by trees in "parkway" planted and maintained by city).

An owner's liability can be based on a city ordinance declaring that an abutting owner who fails to maintain a sidewalk in a non-dangerous condition is liable for resulting injuries. See *Gonzales v City of San Jose* (2004) 125 CA4th 1127, 1132, 23 CR3d 178 ("rise" in sidewalk caused trip and fall; ordinance was constitutional exercise of city power). Otherwise, statutes requiring abutting owners to repair sidewalks (see, *e.g.,* Str & H C §5610) do not, by themselves, create a duty of care to pedestrians. See *Contreras v Anderson, supra; Jones v Deeter, supra; Schaefer v Lenahan* (1944) 63 CA2d 324, 331, 146 P2d 929, 932. See Anno, 88 ALR2d 331, 354 (1963).

An abutting owner is liable, however, for negligently conducting activities that create a special hazard on the sidewalk. *Kopfinger v Grand Cent. Pub. Mkt.* (1964) 60 C2d 852, 857, 37 CR 65, 68 (meat product left on sidewalk from deliveries); *Lee v Ashizawa* (1964) 60 C2d 862, 865, 37 CR 71, 73 (oil on sidewalk from business activities). But see *Victor v Hedges* (1999) 77 CA4th 229, 91 CR2d 466 (owner who illegally parked his car on sidewalk not liable to pedestrian hit by another car that had veered onto sidewalk; see §4.21); *Jamison v Mark C. Bloome Co.* (1980) 112 CA3d 570, 577, 169 CR 399 (owner not liable for oil on sidewalk caused by vandals after close of business).

An abutting owner is also responsible for the condition of any public sidewalk that he or his predecessor, or any public agency at his request, has altered for the special benefit of the property and that serves a use independent of the ordinary uses of sidewalks. *Peters v City & County of San Francisco* (1953) 41 C2d 419, 423, 260 P2d 55, 58 (ramp to garage); *Sexton v Brooks* (1952) 39 C2d 153, 157, 245 P2d 496, 498 (vestibule to store). See *Seaber v Hotel Del Coronado* (1991) 1 CA4th 481, 488, 2 CR2d 405 (hotel not liable for pedestrian injury merely because it requested relocation of crosswalk for guests' benefit); *Reinach v City & County of San Francisco* (1958) 164 CA2d 763, 769, 331 P2d 1006, 1009 (lessee's liability); *Winston v Hansell* (1958) 160 CA2d 570, 576, 325 P2d 569, 572 (driveway not special use).

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§10.41 2. Conditions Affecting Vehicular Traffic

A landowner must use reasonable care in maintaining trees and shrubs on his property to prevent an unreasonable risk of harm to highway users. See *Carson v Facilities Dev. Co.* (1984) 36 C3d 830, 847, 206 CR 136 (condominium sign and trees obscured intersection); *Coates v Chinn* (1958) 51 C2d 304, 332 P2d 289 (rural landowner failed to have trees trimmed; large branch fell on highway, causing accident), disapproved on other grounds at 30 C3d 372 n9; *Swanberg v O'Mectin* (1984) 157 CA3d 325, 330, 203 CR 701 (landlord's liability for tenants' negligent maintenance of shrubs obscuring intersection; nondelegable duty); *Harris v De La Chapelle* (1976) 55 CA3d 644, 648, 127 CR 695 (hedge obscured view of stop sign), disapproved on other grounds at 30 C3d 372 n9; *Wisher v Fowler* (1970) 7 CA3d 225, 86 CR 582 (failure to trim hedge that obscured vision at intersection).

The adjacent owner is not liable, however, for conditions created by a public entity. See *Scott v Chevron U.S.A.* (1992) 5 CA4th 510, 516, 6 CR2d 810 (guardrail placed by state to protect defendant's equipment near highway). See also *Laabs v Southern Cal. Edison Co.* (2009) 175 CA4th 1260, 97 CR3d 241 (injury to passenger in car that collided with other car and veered into pole placed 18 inches from curb by public utility). See generally Restatement (Second) of Torts §§363-371 (1965).

A contractor that agreed to install traffic signals in a development is not liable for failing to do so absent proof that absence of the signals increased preexisting hazards. See *Paz v State* (2000) 22 C4th 550, 93 CR2d 703. See §6.16.

See Anno, 69 ALR4th 1092 (1989) (owner's liability for vegetation obscuring view at intersection).

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§10.42 B. Street Vendors' Liability

Generally, a business proprietor is not required to protect patrons approaching on public streets or sidewalks; his duties are ordinarily limited to premises under his actual or apparent control. *Nevarez v Thriftimart, Inc.* (1970) 7 CA3d 799, 806, 87 CR 50 (child crossing street to store); *Rufo v National Broad. Co.* (1959) 166 CA2d 714, 721, 334 P2d 16, 21 (patron waiting in line on sidewalk).

Anyone who conducts business *in* a public street, however, has a duty to use ordinary care to protect patrons from traffic hazards in the vicinity. *Schwartz v Helms Bakery Ltd.* (1967) 67 C2d 232, 242, 60 CR 510, 517 (bakery truck; vendor's duties analogous to those owed business invitee); *Ellis v Trowen Frozen Prods.* (1968) 264 CA2d 499, 502, 70 CR 487, 490 (ice cream vendor). See *Menchaca v Helms Bakeries, Inc.* (1968) 68 C2d 535, 540, 67 CR 775, 778 (vendor's vehicle hit patron).

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VI. DEFENSES

A. Exculpatory Clauses

§10.43 1. Limiting Owners' Liability to Visitors

The owner of premises may, before granting permission to enter, require a visitor to agree to release or exculpate the owner from liability for injuries suffered by the visitor on the premises. Preinjury release agreements ("contractual assumption of risk") have been enforced with respect to sports and recreational activities when the injuries result from an inherent risk of the activity and the agreement is clear and explicit. See *Benedek v PLC Santa Monica, LLC* (2002) 104 CA4th 1351, 129 CR2d 197 (clause in health club membership agreement sufficiently broad to exonerate club for injury incurred while not using exercise equipment; see §1.54); *YMCA of Metropolitan Los Angeles v Superior Court* (1997) 55 CA4th 22, 63 CR2d 612 (release required for participation in program for seniors not against public policy; see §1.54); *Randas v YMCA of Metro. Los Angeles* (1993) 17 CA4th 158, 161, 21 CR2d 245 (release on enrolling in swim class; plaintiff slipped on wet tiles; plaintiff's inability to read English does not invalidate agreement unless defendant had notice of it); *Coates v Newhall Land & Farming, Inc.* (1987) 191 CA3d 1, 4, 236 CR 181 (riding dirt bike in recreational park; agreement barred wrongful death action). See Anno, 54 ALR5th 513 (1997) (agreements exempting amusement facility operators from liability to patrons).

To be enforceable, however, an agreement, prepared by the owner, that purports to exculpate the owner from liability for his own negligence must clearly and explicitly so state and be comprehensible, free of ambiguity and obscurity, and printed in legible type. See *Zipusch v LA Workout, Inc.* (2007) 155 CA4th 1281, 1287, 66 CR3d 704 (clause in membership agreement did not state that health club would be exculpated from liability for its own negligence; ambiguity construed against drafter); *Conservatorship of Link* (1984) 158 CA3d 138, 143, 205 CR 513 (racing pit crewman not barred by convoluted fine print in sign-in sheet and pit pass); *Ferrell v Southern Nev. Off-Road Enthusiasts, Ltd.* (1983) 147 CA3d 309, 318, 195 CR 90 (driver in dune buggy race not barred); *Celli v Sports Car Club of Am.* (1972) 29 CA3d 511, 518, 105 CR 904 (pit pass that released organizer from liability for injuries "resulting from any accident or other occurrence" did not absolve from liability organizer's active negligence; failure to provide adequate barrier was active negligent omission, not passive negligence). See also *Solis v Kirkwood Resort Co.* (2001) 94 CA4th 354, 360, 114 CR2d 265 (exculpatory clause in plaintiff's midweek ski pass, not in day-pass under which plaintiff was skiing on Sunday, did not necessarily protect resort owner); *Woodall v Wayne Steffner Prods.* (1962) 201 CA2d 800, 20 CR 572 (release from "any and all responsibility, liability or claims" did not absolve from liability for negligence). At best, a general exculpatory clause (such as those quoted above) releases from passive, but not active, negligence.

An exculpatory agreement relating to recreational activities that purports to release liability for future gross negligence violates public policy and is unenforceable and ineffective. *City of Santa Barbara v Superior Court* (*Janeway)* (2007) 41 C4th 747, 750, 62 CR3d 527 (permitting disabled child, who was subject to seizures, to dive into deep end of crowded public pool without close supervision could amount to gross negligence not covered by release from liability for "any negligent act").

For further discussion of exculpatory agreements, see §§1.54, 3.32.

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§10.44 2. Limiting Landlords' Liability to Tenants

Civil Code §1953(a)(5) declares void, as contrary to public policy, any provision in a residential lease or rental agreement that was executed on or after January 1, 1976, by which the lessee agrees to modify or waive the right to have the landlord exercise a duty of care to prevent personal injury or personal property damage. Exculpatory clauses in residential leases, whenever executed, are in certain circumstances also invalid as violating public policy. *Henrioulle v Marin Ventures, Inc.* (1978) 20 C3d 512, 517, 143 CR 247.

Before 1976, a lease or rental provision exempting a landlord from liability for injury to persons or property was valid between the parties as to passive negligence (*Werner v Knoll* (1948) 89 CA2d 474, 476, 201 P2d 45, 46) unless the transaction was deemed to affect the public interest (see *Akin v Business Title Corp.* (1968) 264 CA2d 153, 159, 70 CR 287, 291 (escrow agreement as contract of adhesion)). An exemption provision was not binding on third persons, however. *Larson v Santa Clara Valley Water Conserv. Dist.* (1963) 218 CA2d 515, 525, 32 CR 875, 879 (invitee of lessee); *Both v Harband* (1958) 164 CA2d 743, 747, 331 P2d 140, 143 (pedestrian outside building). See CC §2777 (indemnity agreements).

Even between parties, a pre-1976 exemption provision did not ordinarily apply to premises or conditions controlled, or to activities carried on, by the landlord. *Hollander v Wilson Estate Co.* (1932) 214 C 582, 585, 7 P2d 177, 178 (elevator); *City of Oakland v Oakland Unified Sch. Dist.* (1956) 141 CA2d 733, 737, 297 P2d 752, 755 (walkway). The landlord could not exempt himself from liability for a statutory violation (*Hanna v Lederman* (1963) 223 CA2d 786, 792, 36 CR 150) or for a willful injury (CC §1668). See generally *Barkett v Brucato* (1953) 122 CA2d 264, 278, 264 P2d 978, 988; *Butt v Bertola* (1952) 110 CA2d 128, 138, 242 P2d 32, 39.

Exculpatory clauses in commercial leases must be express and unequivocal to immunize a lessor from liability for harm and loss resulting from its active or affirmative negligence. See *Burnett v Chimney Sweep, LLC* (2004) 123 CA4th 1057, 1066, 20 CR3d 562 (exculpatory clause in commercial lease did not necessarily exempt lessor from liability resulting from refusing to remediate problems caused by excessive moisture and mold).

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§10.45 B. Contributory Fault

The contributory negligence (or other fault) of anyone injured on premises effects a proportional reduction of the plaintiff's recovery. See §1.41. This defense applies if, *e.g.,* the injured person

- chose to walk on an unsafe surface when a safe one was equally convenient (see *Beauchamp v Los Gatos Golf Course* (1969) 273 CA2d 20, 28, 77 CR 914, 920);
- was or should have been aware of a dangerous condition and did not take proper precautions to avoid it (*Prescott v Ralphs Grocery Co.* (1954) 42 C2d 158, 163, 265 P2d 904, 906; *Scott v Alpha Beta Co.* (1980) 104 CA3d 305, 310, 163 CR 544; *Harris v Trinity Lodge* (1962) 202 CA2d 41, 43, 20 CR 348, 350); or
- engaged in active negligent conduct that was a contributing cause of the accident (*Richardson v Oliveri* (1966) 244 CA2d 369, 373, 53 CR 59, 62). See generally *Pittman v Pedro Petroleum Corp.* (1974) 42 CA3d 859, 864, 117 CR 220 (13-year-old trespasser who fell from unguarded ladder on construction crane was contributorily negligent as a matter of law); *Smith v Americania Motor Lodge* (1974) 39 CA3d 1, 8, 113 CR 771 (trespassing children swam in unguarded pool). See also *Haft v Lone Palm Hotel* (1970) 3 C3d 756, 770 n14, 775, 91 CR 745 (swimming pool without safety equipment or lifeguard; father's contributory negligence a jury question, 5-year-old boy's not). See Anno, 83 ALR5th 589 (2000) (defenses to liability for tracked-in water or snow).

The reasonableness of the injured visitor's conduct may be affected by his status on the premises. See *Beauchamp v Los Gatos Golf Course* (1969) 273 CA2d 20, 35, 77 CR 914, 924 (certain invitor/invitee doctrines not abrogated by *Rowland v Christian* (see §10.4)). For example, an invitee may ordinarily assume that he may use the area to which the invitation extends without danger (*Chance v Lawry's, Inc.* (1962) 58 C2d 368, 373, 24 CR 209, 211) and is not required to make a critical inspection (*Florez v Groom Dev. Co.* (1959) 53 C2d 347, 357, 1 CR 840, 846 (subcontractor's employee); *Celli v Sports Car Club of Am.* (1972) 29 CA3d 511, 523, 105 CR 904 (car race patron); see *Gates v Gautier* (1938) 29 CA2d 524, 525, 85 P2d 141, 142 (resort patron)). Distractions may excuse failure to observe an obvious danger. *Larid v T.W. Mather, Inc.* (1958) 51 C2d 210, 217, 331 P2d 617, 621 (shopper in department store).

A tenant using premises with prior knowledge of defects may not be contributorily negligent if he has reasonably relied on the landlord's assurances that repairs would be made. *Harris v Joffe* (1946) 28 C2d 418, 425, 170 P2d 454, 458; *Ewing v Balan* (1959) 168 CA2d 619, 623, 336 P2d 561, 564. Whether a tenant or his guest used due care in proceeding into a dark place depends on the circumstances. See *Merrill v Buck* (1962) 58 C2d 552, 561, 25 CR 456, 463. See Annos, 24 ALR3d 388 (1969) (inside hall or passageway), 23 ALR3d 441 (1969) (exterior premises), 23 ALR3d 365 (1969) (outside steps or stairs), 22 ALR3d 599 (1968) (outside path or walkway).

The rescue doctrine may negate visitor's contributory fault. See §1.44.

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Source: Torts/California Tort Guide/10 Premises Liability/§10.46 C. Assumption of Risk; Sports Participants and Spectators

§10.46 C. Assumption of Risk; Sports Participants and Spectators

There are two varieties of *implied* assumption of risk: "secondary" assumption of risk, which is a variant of contributory negligence that results in a proportionate reduction of a plaintiff's recovery; and "primary" assumption of risk, which is a complete bar to recovery. See discussion in §§1.43, 1.46 of the California Supreme Court's 1992 reformulation of the assumption of risk defense. See §§10.43-10.44 on visitors' and guests' express assumption of risk by signing releases or exculpatory agreements.

Basically, primary assumption of risk is a complete defense when a plaintiff voluntarily participates in certain sports and recreational activities and is injured as a result of an "inherent risk" of such activity. See §§1.46-1.53. Someone injured while skiing, for example, generally cannot recover from the ski run owner or proprietor on the ground that the terrain was hazardous. See *Souza v Squaw Valley Ski Corp.* (2006) 138 CA4th 262, 41 CR3d 389 (skiing into clearly visible snow-making hydrant was inherent risk of skiing, even for 8-year-old; see also §10.16); *O'Donoghue v Bear Mountain Ski Resort* (1994) 30 CA4th 188, 193, 35 CR2d 467 (boulder-filled ravine bordering ski run); *Danieley v Goldmine Ski Assocs.* (1990) 218 CA3d 111, 266 CR 749 (trees bordering ski run). See also *Knight v Jewett* (1992) 3 C4th 296, 315, 11 CR2d 2 (referring to moguls on a ski run).

Recent cases finding a primary assumption of risk seem generally consistent with the former rule that a spectator or a participant in a sport or recreational activity assumed the ordinary, expected, or commonly known risks of the event. See *Beninati v Black Rock City, LLC* (2009) 175 CA4th 650, 96 CR3d 105 (Burning Man Festival attendee who tripped and fell into fire); *Nemarnik v Los Angeles Kings Hockey Club* (2002) 103 CA4th 631, 127 CR2d 10 (spectator hit by puck during warm-up at hockey game); *Tavernier v Maes* (1966) 242 CA2d 532, 544, 551, 51 CR 575, 581 (participant in softball game); *McDaniel v Dowell* (1962) 210 CA2d 26, 36, 26 CR 140, 146 (skier); *Morton v California Sports Car Club* (1958) 163 CA2d 685, 688, 329 P2d 967, 969 (spectator at sports car race). See Annos, 35 ALR5th 731 (1996) (insurance covering injuries at athletic and sports contests and exhibitions); 55 ALR4th 632 (1987) (ski resort's liability for condition of slope).

An assumption of risk is secondary when the injury is caused by a risk that is not inherent in the activity. See, *e.g., Van Dyke v S.K.I. Ltd.* (1998) 67 CA4th 1310, 79 CR2d 775 (difficult-to-see, inadequately padded signpost in ski run not risk inherent in skiing); *Freeman v Hale* (1994) 30 CA4th 1388, 36 CR2d 418 (plaintiff did not assume increased risk of collisions with other skiers caused by other skier's drinking). See also *Luna v Vela* (2008) 169 CA4th 102, 86 CR3d 588 (child injured when he tripped over volleyball net support line in homeowner's front yard); *Branco v Kearny Moto Park, Inc.* (1995) 37 CA4th 184, 193, 43 CR2d 392 (jumps, but not dangerously designed jumps, inherent in bicycle motocross); *Yancey v Superior Court* (1994) 28 CA4th 558, 33 CR2d 777 (participant in discus throwing class did not assume risk that coparticipant would throw discus while plaintiff was retrieving hers).

Recent cases finding a secondary assumption of risk are, to some extent, consistent with earlier cases holding that a plaintiff did not necessarily assume extraordinary, uncommon, or unknown risks, such as those arising from negligent conduct, defective conditions, or a violation of the rules or customs of the activity. *Chase v Shasta Lake Union Sch. Dist.* (1968) 259 CA2d 612, 616, 66 CR 517, 520 (ballplayer; condition of field); *Goade v Benevolent Protective Order of Elks* (1963) 213 CA2d 189, 194, 28 CR 669, 671 (auto race spectator). See Anno, 7 ALR2d 704 (1949) (liability for injury or death of participant in game or contest). See also *Celli v Sports Car Club of Am.* (1972) 29 CA3d 511, 521, 105 CR 904 (effect of exculpatory agreement). Compare *Curran v Green Hills Country Club* (1972) 24 CA3d 501, 101 CR 158 (assumption of risk instruction should not have been given when homeowner was struck by golf ball hit from adjacent course), with *American Golf Corp. v Superior Court* (2000) 79 CA4th 30, 93 CR2d 683 (owners not liable when golfer hit by ball that bounced off yardage marker); *Dilger v Moyles* (1997) 54 CA4th 1452, 63 CR2d 591 (no liability to golfer struck by errant ball). See also assumption of risk cases in §1.51.

Before the 1992 reformulation of the assumption of risk defense, it had been held that a baseball spectator who chose to sit in an unscreened area assumed the risk of being hit by batted balls if an adequate number of screened seats were provided. *Quinn v Recreation Park Ass'n* (1935) 3 C2d 725, 46 P2d 144; *Neinstein v Los Angeles Dodgers, Inc.* (1986) 185 CA3d 176, 184, 229 CR 612. But see *Rudnick v Golden W. Broadcasters* (1984) 156 CA3d 793, 202

CR 900 (issue whether ball club provided adequate screened seats). Further, an owner's conduct that raises the level of risk inherent in the plaintiff's participation negates primary assumption of risk. See *Lowe v California League of Professional Baseball* (1997) 56 CA4th 112, 123, 65 CR2d 105 (liability to patron distracted by antics of team mascot before being struck by foul ball).

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Product Liability

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I. STRICT PRODUCT LIABILITY

§11.1 A. Basic Concepts; Terminology

Strict product liability is a legal theory under which a plaintiff may recover damages for injury to persons or property caused by a defective product supplied by a defendant. *Greenman v Yuba Power Prods., Inc.* (1963) 59 C2d 57, 62, 27 CR 697, 700 (a manufacturer is strictly liable in tort when injury results to person or property from a defect in a product that was supplied knowing that it was to be used without inspection for defects); *Seely v White Motor Co.* (1965) 63 C2d 9, 19, 45 CR 17, 24 (property damage). See generally Restatement (Second) of Torts §402A (1965); Prosser, Strict Liability to the Consumer in California, 18 Hastings LJ 9, 17 (1966).

A plaintiff may invoke the strict product liability theory against, and may name as a defendant (or the sole defendant), any person or entity that participated in making or marketing the defective product or in placing it in the stream of commerce, including the manufacturer, distributors, and retailers, regardless of which entity created the defect. See §11.29. A person sued may seek full indemnification from those responsible for the defect. See §11.40.

NOTE: This chapter uses "supplier" to encompass the manufacturer and everyone else engaged in making and marketing the product. See §§11.29-11.34 on persons and entities covered by this term and §§11.35-11.38 on what is a "product."

The term "strict product liability" is used rather than its less precise synonym "strict liability in tort." The term names a liability theory (or "tort") or, in a pleading, a "cause of action" or "count."

Strict product liability is not absolute liability; a supplier is not an insurer of the safety of a product user. *Anderson v Owens-Corning Fiberglas Corp.* (1991) 53 C3d 987, 1003, 281 CR 528. The consumer's injury must have been caused by a *defect* in the product, and a supplier is not responsible when an unforeseeable use of the product results in injury. *Daly v General Motors Corp.* (1978) 20 C3d 725, 733, 144 CR 380. See §11.4.

Further, strict product liability is not "no-fault" liability. The fault, however, is the placement of a *defective* product in the stream of commerce. See *Montez v Ford Motor Co.* (1980) 101 CA3d 315, 318, 161 CR 578 (requirement that product be proved defective distinguishes strict product liability from genuine strict liability, which would render supplier liable for all accidents caused by its product). Under California's comparative fault system (see §1.41), a trier of fact can compare the "fault" involved in supplying a defective product to the negligence and willful misconduct of other tortfeasors and the plaintiff. See §11.42 on the contributory fault defense.

NOTE: The California Supreme Court has rejected the view that a gun can be viewed as defectively designed if it was advertised in a way that increased the risk that it would be misused. See *Merrill v Navegar, Inc.* (2001) 26 C4th 465, 110 CR2d 370, noted in §1.13. See also *In re Firearm Cases* (2005) 126 CA4th 959, 24 CR3d 659 (no causal connection with alleged harm). But see *Ileto v Glock, Inc.* (9th Cir 2003) 349 F3d 1191 (gun manufacturers could be liable under public nuisance theory to victims shot by criminals); §11.73 (federal law preemption of such claims against domestic manufacturers). See Annos, 96 ALR5th 239 (2002) (firearms, ammunition, and chemical weapons), 88 ALR5th 1 (2001) (firearm or ammunition manufacturer's or seller's liability for injury caused by gun used in crime), 93 ALR5th 103 (2001) (liability based on advertising).

There are situations in which a plaintiff can gain an advantage by pleading and proving—instead of or in addition to strict product liability—(1) negligence in the manufacture or marketing of the product (see §11.48), (2) breach of warranty (see §11.62), or (3) misrepresentation (see §11.73).

See Annos, 102 ALR5th 99 (2002) (spoliation of evidence in product liability cases; see §1.3), 90 ALR5th 179 (2001) (bystander emotional distress recovery in product liability contexts).

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§11.2 B. Elements of Strict Product Liability

A manufacturer, distributor, or retailer is liable in tort if a defect in the manufacture or design of its product causes injury while the product is being used in a reasonably foreseeable way. *Soule v General Motors Corp.* (1994) 8 C4th 548, 560, 34 CR2d 607; *Morton v Owens-Corning Fiberglas Corp.* (1995) 33 CA4th 1529, 1533, 40 CR2d 22.

A plaintiff establishes strict product liability by pleading and proving that

- the product was being used in an intended or reasonably foreseeable way when it caused the injury (see §11.3);
- the product had a defect when it was sold or leased to a consumer (see §§11.4-11.19); and
- the defect was the legal (proximate) cause (see §§11.20-11.22) of personal injury or property damage (see §§11.23-11.24).

A plaintiff need not plead or prove that

- the person using the product was unaware of the defect (*Luque v McLean* (1972) 8 C3d 136, 146, 104 CR 443; *Henderson v Harnischfeger Corp.* (1974) 12 C3d 663, 670, 117 CR 1);
- the supplier knew of the defect (*Pease v Beech Aircraft Corp.* (1974) 38 CA3d 450, 467, 113 CR 416);
- the defect was hidden or concealed (*Luque v McLean, supra; Buccery v General Motors Corp.* (1976) 60 CA3d 533, 542, 132 CR 605; *Thompson v Package Mach. Co.* (1971) 22 CA3d 188, 192, 99 CR 281; see §11.4);
- the product was unreasonably dangerous (*Barker v Lull Eng'g Co.* (1978) 20 C3d 413, 422, 143 CR 225; *Cronin v J.B.E. Olson Corp.* (1972) 8 C3d 121, 127, 104 CR 433);
- the supplier acted unreasonably or negligently (*Barker v Lull Eng'g Co.* (1978) 20 C3d 413, 418, 143 CR 225) or breached a warranty or agreement (*Greenman v Yuba Power Prods., Inc.* (1963) 59 C2d 57, 64, 27 CR 697, 701; *Pike v Frank G. Hough Co.* (1970) 2 C3d 465, 475, 85 CR 629 (design defect); see Restatement (Second) of Torts §402A, comment m (1965));
- the design of the product varied from the state of the art (as reflected in the design of similar products) in the year of manufacture (*Horn v General Motors Corp.* (1976) 17 C3d 359, 367, 131 CR 78); or
- the product was mass produced (*Rawlings v D.M. Oliver, Inc.* (1979) 97 CA3d 890, 897, 159 CR 119 (producer could be liable even for defects in product made especially for, and to specifications furnished by, plaintiff's employer)).

On the defense that the product is unavoidably unsafe, see §11.47.

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§11.3 1. Product Being Used in Foreseeable Way

The strict product liability theory permits recovery only if the plaintiff's injury was caused by a defective product that was being used in a manner that may be described as

- a way it was intended to be used (*Greenman v Yuba Power Prods., Inc.* (1963) 59 C2d 57, 64, 27 CR 697, 701),
- normal (*Tresham v Ford Motor Co.* (1969) 275 CA2d 403, 410, 79 CR 883, 887), or
- reasonably foreseeable (*Barker v Lull Eng'g Co.* (1978) 20 C3d 413, 426 n9, 143 CR 225; *Cronin v J.B.E. Olson Corp.* (1972) 8 C3d 121, 126, 104 CR 433; see *Shepard v Superior Court* (1977) 76 CA3d 16, 20, 142 CR 612 (under strict liability theory, as in negligence, injury and harm must be reasonably foreseeable)).

The clearest cases of product misuse are those in which the product is used contrary to directions or warnings. *McCurter v Norton Co.* (1968) 263 CA2d 402, 407, 69 CR 493, 496 (overspeeding abrasive wheel); *Erickson v Sears, Roebuck & Co.* (1966) 240 CA2d 793, 799, 50 CR 143, 147 (stepladder altered and used on soft ground).

Misuse also encompasses a use different from, or more strenuous than, that contemplated to be safe by ordinary consumers. *Preston v UpRight, Inc.* (1966) 243 CA2d 636, 640, 52 CR 679, 683. See *Tresham v Ford Motor Co., supra* (jury question whether driving car with two wheels on shoulder of road was intended use). The fact that the product was subjected to unusual or abnormal stress does not bar recovery, however, if the defect became manifest in an accident or occurrence that was reasonably foreseeable by the manufacturer. See §§11.20-11.21.

The reasonably foreseeable use requirement is not to be narrowly applied. *Johnson v Standard Brands Paint Co.* (1969) 274 CA2d 331, 340, 79 CR 194, 199. For example, a supplier is strictly liable for failure of a product that was being used in a way that the supplier had been told that the consumer would use it. See *Lewis v American Hoist & Derrick Co.* (1971) 20 CA3d 570, 580, 97 CR 798.

Similarly, a supplier may be liable for injury caused by defects in a product that was being used in a way, however unusual, that the supplier should have anticipated but did not warn against. See Prosser, *Strict Liability to the Consumer in California*, 18 Hastings LJ 9, 36 (1966) (standing on chair).

NOTE: A defendant may require the plaintiff, at a deposition, to reenact the alleged injury-causing accident. *Emerson Elec. Co. v Superior Court* (1997) 16 C4th 1101, 68 CR2d 883 (plaintiff asked at videotaped deposition to reenact how he was using a radial arm saw when he was injured). Such reenactments may, of course, provide evidence of a misuse of the allegedly defective product.

Mishandling or misuse by the dealer before sale is not a defense available to the manufacturer against the plaintiff, at least when final processing is delegated to the dealer. *Vandermark v Ford Motor Co.* (1964) 61 C2d 256, 261, 37 CR 896, 898; *Alvarez v Felker Mfg. Co.* (1964) 230 CA2d 987, 1003, 41 CR 514, 520 (erroneous jury instructions). See 18 Hastings LJ 9, 40.

Cases appear to require the plaintiff to plead and prove that the product was being used in an intended, normal, or foreseeable manner, as an element of plaintiff's cause of action. See, *e.g., Romito v Red Plastic Co.* (1995) 38 CA4th 59, 69, 44 CR2d 834 (manufacturer not required to design skylight to withstand weight of worker who accidentally fell on it); *Moerer v Ford Motor Co.* (1976) 57 CA3d 114, 129 CR 112 (proof of reasonable use, by testimony that car had not been in a previous collision, was an essential element in plaintiff's proof); *Preston v Up-Right, Inc., supra* (misuse refutes either that product was defective or that it caused injury).

Jury instructions must make it clear that a manufacturer has an obligation to foresee and take precautions against misuse and abuse. See *Fluor Corp. v Jeppesen & Co.* (1985) 170 CA3d 468, 478, 216 CR 68 (failure to give such instruction not cured by giving instructions on implied warranty).

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§11.4 2. Product Defective When Marketed

To recover under the strict product liability theory, the plaintiff must establish that the product was in a defective condition when it was sold. See *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 703, 106 CR 1. See also *Daly v General Motors Corp.* (1978) 20 C3d 725, 733, 144 CR 380. See §11.48 on a supplier's negligence liability for failing to retrofit a previously marketed product or to conduct an adequate retrofit campaign.

NOTE: For a pre-comparative-fault view, see *McCurter v Norton Co.* (1968) 263 CA2d 402, 406, 69 CR 493 (supplier not ordinarily liable for injury caused by defect created when product altered after sale, lease, or other transfer from supplier to consumer); *Erickson v Sears, Roebuck & Co.* (1966) 240 CA2d 793, 799, 50 CR 143, 147.

Liability is imposed on a supplier that should have foreseen the posttransfer alteration and that could have designed the product to prevent the reasonably foreseeable alteration or to diminish its risk. See *Thomas v General Motors Corp.* (1970) 13 CA3d 81, 89, 91 CR 301.

A supplier may be liable for harm caused by *patent* (obvious) defects. *Luque v McLean* (1972) 8 C3d 136, 144, 104 CR 443, 448; *Buccery v General Motors Corp.* (1976) 60 CA3d 533, 542, 132 CR 605, 610. A supplier may also be liable for harm caused by a product defect that was *latent* in that it became manifest only when the product was subjected to abnormal stress of a reasonably foreseeable kind. See *Cronin v J.B.E. Olson Corp.* (1972) 8 C3d 121, 126, 104 CR 433 (hasp on bread truck rack failed when truck was involved in accident); *Culpepper v Volkswagen of Am., Inc.* (1973) 33 CA3d 510, 518, 109 CR 110 (emergency turn caused car to roll over). See §11.21 on crashworthiness.

See Annos, 47 ALR5th 395 (1997) (manufacturer's liability under postsale obligation to modify, repair, or recall); 54 ALR3d 1079 (1973) (proof that defect was present when product left defendant's hands), 41 ALR3d 1251 (1972) (effect of alteration of product after it leaves manufacturer's or seller's hands).

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§11.5 a. Categories of Product Defects

Barker v Lull Eng'g Co. (1978) 20 C3d 413, 427, 143 CR 225, notes that "defect" is neither self-defining nor susceptible of a single definition that would apply in all contexts, and identifies two categories of product defect:

- Manufacturing defects, in which the product deviates from the manufacturer's intended result (*e.g.,* it comes off the assembly line in substandard condition); and
- Design defects, in which either
- the product failed to perform as safely as an ordinary consumer would expect; or
- the design embodied excessive preventable danger, *i.e.,* the risk of danger inherent in the design of the product outweighs the benefits of the design in light of such factors as the gravity of the danger, the likelihood of its occurrence, the cost and feasibility of a safer design, and the adverse consequences to the product and to consumers that would result from an alternative design. See *McCabe v American Honda Motor Co.* (2002) 100 CA4th 1111, 1119, 123 CR2d 303 (automobile air bag).

The facts of the case determine whether the jury must be instructed on both *Barker* defect categories, or on only one of them. *Soule v General Motors Corp.* (1994) 8 C4th 548, 34 CR2d 607; *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 801, 174 CR 348. See *Bracisco v Beech Aircraft Corp.* (1984) 159 CA3d 1101, 206 CR 431 (instructions that failed to differentiate alternative ways to prove design defect were prejudicial). See also *Franck v Polaris E-Z Go Div. of Textron, Inc.* (1984) 157 CA3d 1107, 1115, 204 CR 321, 325 (evidence supported liability under both prongs of *Barker* test).

Emerging as a third, separate category of product defect is a supplier's failure to include, on a product or its packaging, warnings of dangerous characteristics that are not obvious. See §11.14. Some courts, however, have treated failure to include adequate warnings or instructions as a type of design defect. See, *e.g., Cavers v Cushman Motor Sales, Inc.* (1979) 95 CA3d 338, 343, 157 CR 142.

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§11.6 b. Proving Product Was Defective

Circumstantial evidence may prove that a product was defective when sold. *Vandermark v Ford Motor Co.* (1964) 61 C2d 256, 260, 37 CR 896, 898; *Southern Cal. Edison Co. v Harnischfeger Corp.* (1981) 120 CA3d 842, 852, 175 CR 67. Further, direct or circumstantial evidence may provide the basis for an inference that the product was defective when sold. *Elmore v American Motors Corp.* (1969) 70 C2d 578, 584, 75 CR 652, 655 (drive shaft fell when car had been driven less than 2800 miles). See also *Aetna Cas. & Sur. Co. v Farmers Bros. Co.* (1998) 65 CA4th 574, 579, 76 CR2d 587 (jury free to reject defense expert's testimony and to believe plaintiff's expert's testimony that 400-watt coffeemaker had 500-watt coil that started fire); *Hinckley v La Mesa R.V. Ctr.* (1984) 158 CA3d 630, 642, 205 CR 22 (evidence that wiring defect was probable cause of fire, although fire damage prevented determination of specific defect); *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 791, 174 CR 348, 370 (no error in receipt of evidence of cost to manufacturer of safer design, or in exclusion of statistical study based on questionable data). But see *Barrett v Atlas Powder Co.* (1978) 86 CA3d 560, 564, 150 CR 339 (fact that blasting cap exploded while being handled was insufficient to establish that it was defective in manufacture or design when sold 30 years earlier).

The plaintiff may not, however, invoke the res ipsa loquitur presumption to establish the existence of a defect in the product. *Tresham v Ford Motor Co.* (1969) 275 CA2d 403, 406, 79 CR 883, 885 (proper to reject instruction that from happening of accident inference arises that some defect in automobile was proximate cause). Further, a defendant's failure to present expert testimony to counter the testimony of a plaintiff's expert does not necessarily require a judgment for the plaintiff. See *Howard v Owens Corning* (1999) 72 CA4th 621, 85 CR2d 386 (jury could reject plaintiff's experts' testimony that illness was caused by exposure to asbestos).

See Note in §11.3 on requiring the plaintiff at a deposition to reenact how he or she was using the product when it was alleged to have caused injury.

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§11.7 (1) Manufacturing Defects

A plaintiff proves that a manufacturing defect exists by evidence that the product differs from (a) the manufacturer's intended result or (b) apparently identical products from the same manufacturer. See *Montez v Ford Motor Co.* (1980) 101 CA3d 315, 320, 161 CR 578 (refusal to give instruction, drawn from BAJI 9.00.3, not reversible error if nature of alleged defect was obvious (*e.g.,* broken gear tooth or foreign object in steering gearbox)). See also *Barker v Lull Eng'g Co.* (1978) 20 C3d 413, 431, 143 CR 225 (plaintiff has burden of proof). For jury instructions, see CACI 1201-1202 (JC Cal Civ Jury Inst 2003).

A manufacturer can be liable for participating in placing an otherwise well-made and safely designed product at a site where other factors or products make foreseeable uses of it dangerous. See *DeLeon v Commercial Mfg. & Supply Co.* (1983) 148 CA3d 336, 347, 195 CR 867 (bin placed in plant near rotating shaft).

Liability for injury from a manufacturing defect cannot be based solely on the fact that the plaintiff suffered an allergic reaction when using the product if the product was manufactured precisely as designed and was not materially different from identical units from the same product line. *In re Coordinated Latex Glove Litig.* (2002) 99 CA4th 594, 604, 121 CR2d 301.

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§11.8 (2) Design Defects

A plaintiff may prove that the injury resulted from a design defect by evidence that a different configuration or composition would have prevented the injury, permitting the trier of fact to infer that the product (a) fell short of ordinary consumer safety expectations (see §11.9) or (b) embodied excessive preventable danger (see §11.10). See *Barker v Lull Eng'g Co.* (1978) 20 C3d 413, 431, 143 CR 225.

At least in federal cases, the test for the admissibility of "scientific" testimony listed in *Daubert v Merrell Dow Pharm., Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786, also applies to the admissibility of testimony based on "technical" or "other specialized" knowledge. *Kumho Tire Co. Ltd. v Carmichael* (1999) 526 US 137, 143 L Ed 2d 238, 119 S Ct 1167 (testimony of expert in tire failure analysis excluded). See §11.5 on categories of design defect.

NOTE: Generally, the makers and suppliers of prescription drugs and medical implants are immune from liability for design defects, although they may be liable for manufacturing defects and for failing to provide adequate warnings or instructions. See §9.2. For more on *Daubert*'s effect on proof of causation in drug and implant cases, see §11.20.

A product may be found to be defective even if its design does not deviate from the industry norm. *Jiminez v Sears, Roebuck & Co.* (1971) 4 C3d 379, 383, 93 CR 769; *Foglio v Western Auto Supply* (1976) 56 CA3d 470, 477, 128 CR 545 (error to permit jury to consider whether lawnmower design conformed to "custom or practice" in the business). Nor does the fact that thousands of the product have been in use without causing injury rule out that the product is defective in design. *Heap v General Motors Corp.* (1977) 66 CA3d 824, 831, 136 CR 304 (defective accelerator pedal). See *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 803, 174 CR 348 (industry custom or usage irrelevant to defect issue).

Further, the fact that the product complied with government safety standards does not preclude liability for a design defect. *Buccery v General Motors Corp.* (1976) 60 CA3d 533, 540, 132 CR 605 (failure to equip vehicle with head restraints could make it defective even though they were not required by federal law). See *Elsworth v Beech Aircraft Corp.* (1984) 37 C3d 540, 548, 208 CR 874 (proof that product complied with governmental safety standards or requirements no defense if such compliance insufficient to meet ordinary consumer's safety expectations or to establish that benefits of particular design outweighed risks). See also *Brocklesby v U.S.* (9th Cir 1985) 767 F2d 1288 (aviation navigational chart defective even though defect originated with Federal Aviation Agency; chart maker could have discovered FAA inadequacies, sought corrections, and added warnings to chart); *McLaughlin v Sikorsky Aircraft* (1983) 148 CA3d 203, 207, 195 CR 764 (although manufacturer's compliance with military specifications in designing helicopter is no defense, government contractor immunity (see §11.45) might apply).

A product's conformation to plans furnished by the purchaser does not immunize its manufacturer from design defect liability. *Rawlings v D.M. Oliver, Inc.* (1979) 97 CA3d 890, 896, 159 CR 119, 121 (plaintiff alleged that kelp dryer was defective because it had unguarded gears, no shutoff mechanism, and no warnings).

On proving the existence of a defect, see Annos, 86 ALR5th 215 (2001) (prudent manufacturer test), 29 ALR5th 534 (1995) (admissibility of government fact findings), 78 ALR4th 154 (1990) (burden of proving feasibility of alternative safe design), 4 ALR4th 651 (1981) (expert or opinion evidence), 84 ALR3d 1220 (1978) (product recall letter), 96 ALR3d 22 (1979) (defective design cases).

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Source: Torts/California Tort Guide/11 Product Liability/§11.9 (a) Consumer Expectations Not Met

§11.9 (a) Consumer Expectations Not Met

A product supplier is liable for a design defect if the trier of fact finds that the product failed to perform as safely as the persons who ordinarily use or consume it would expect; the question of how safely the product should have performed must be answerable from the common experience of those who ordinarily use it; otherwise, the trier of fact must engage in a balancing of risks and benefits (see §11.10). *Soule v General Motors Corp.* (1994) 8 C4th 548, 34 CR2d 607 (test is whether circumstances of product's failure permit inference that it performed below legitimate, commonly accepted minimum safety assumptions of its ordinary consumers; thus, consumer-expectations instruction should not have been given when car driver injured by chassis deformation following collision). In the case of a product not ordinarily used by the general public (so that the public and ordinary jurors would not have an understanding of how safely it should perform), expert testimony is admissible to show what the product's actual users would expect. See 8 C4th 567 n4.

NOTE: Perhaps contrary to the last of the preceding statements is the holding in *Pruitt v General Motors Corp.* (1999) 72 CA4th 1480, 86 CR2d 4. *Pruitt* quotes a statement in *Soule* that "where the minimum safety of a product is within the common knowledge of lay jurors, expert witnesses may not be used to demonstrate what an ordinary consumer would or should expect," as the basis for concluding—after asserting that the deployment of automobile air bags is not part of the everyday experience of the consuming public and that minimum safety standards for air bags are not within the common knowledge of lay jurors—that jurors needed expert testimony to evaluate the risks and benefits of the challenged design and that, therefore, a requested consumer-expectations instruction was properly not given. The *Pruitt* court rejects as "dicta" statements in *Bresnahan v Chrysler Corp.* (1995) 32 CA4th 1559, 38 CR2d 446 (ordinary consumer would not expect air bag inflation in low-speed collision to break driver's arm), that the fact that the plaintiff has stated a prima facie risk/benefit case does not preclude also showing that the product failed to meet consumer expectations, and in *Bresnahan v Chrysler Corp.* (1998) 65 CA4th 1149, 76 CR2d 804 (when jury instructed on failure to warn (see §11.14) as well as both tests for design defect, general verdict for plaintiff valid if evidence supported failure to warn theory). Neither *Pruitt* nor *Bresnahan* is necessarily applicable in a case in which an air bag failed to deploy when a consumer might have expected it to do so. See *McCabe v American Honda Motor Co.* (2002) 100 CA4th 1111, 1123, 123 CR2d 303.

A consumer-expectations instruction may be given even if the mechanism by which the injury resulted must be explained by expert testimony. See *Jones v John Crane, Inc.* (2005) 132 CA4th 990, 1001, 35 CR3d 144 (navy man exposed to asbestos from numerous manufacturers during career); *Morton v Owens-Corning Fiberglas Corp.* (1995) 33 CA4th 1529, 1534, 40 CR2d 22 (exposure to asbestos products); *West v Johnson & Johnson Prods.* (1985) 174 CA3d 831, 865, 220 CR 437 (toxic shock syndrome following use of tampon); *Lunghi v Clark Equip. Co.* (1984) 153 CA3d 485, 496, 200 CR 387 (consumer-expectations instruction proper even though ordinary jurors would not know what to expect from front loader boom arms). See also *Akers v Kelley Co.* (1985) 173 CA3d 633, 651, 219 CR 513, disapproved on other grounds in *People v Nesler* (1997) 16 C4th 561, 582 n5, 66 CR2d 454 (catapulting action of forklift dockboard caused bizarre accident). See §13.20 on drugs and implants.

There are situations, however, in which a consumer-expectations instruction should not be given, because of the need for expert testimony. *Stephen v Ford Motor Co.* (2005) 134 CA4th 1363, 1371 n6, 37 CR3d 9 (evidence that tread separated from right rear tire and vehicle rolled over insufficient basis for ordinary consumer to find that tire or vehicle was defective; expert must balance benefits of design against risk of danger); *In re Coordinated Latex Glove Litig.* (2002) 99 CA4th 594, 614, 121 CR2d 301; *Morson v Superior Court (Medline Indus., Inc.)* (2001) 90 CA4th 775, 791, 109 CR2d 343 (expert testimony in medical and manufacturing fields needed in latex glove cases to aid trier of fact in understanding relevant sequence of events and nature of alleged injuries).

To establish a prima facie case of design defect for failure to meet consumer safety expectations, the plaintiff must produce evidence of (1) his or her use of the product, (2) the circumstances of the injury, and (3) the objective features of the product relevant to evaluating its safety, although the plaintiff may rely on circumstantial evidence. *Aetna Cas. & Sur. Co. v Farmers Bros. Co.* (1998) 65 CA4th 574, 579, 76 CR2d 587 (plaintiff produced expert testimony and other evidence that coffee machine started fire after restaurant closed for night). See Anno, 73 ALR5th 75 (1999) (consumer-expectations test).

A supplier may be liable for injury resulting from a product's failure to meet ordinary consumer expectations even if (a) its design benefits outweigh the danger inherent in the design (see *Curtis v State* (1982) 128 CA3d 668, 687, 180 CR 843, 853) or (b) the danger of the design is obvious (see *Williams v Beechnut Nutrition Corp.* (1986) 185 CA3d

135, 229 CR 605 (glass juice bottle for infants susceptible to breakage).

Determining whether a product failed to meet consumer safety expectation is not aided by evidence that "state of the art" medical and scientific knowledge at the time the product was manufactured did not include knowledge that the product was dangerous. See *Morton v Owens-Corning Fiberglas Corp.* (1995) 33 CA4th 1529, 1536, 40 CR2d 22. See §11.17 on state-of-the-art evidence.

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§11.10 (b) Risks of Design Outweigh Benefits

A plaintiff's prima facie showing that the injury was legally caused by the product's design, shifts to the defendant the burden of persuading the trier of fact that the product should not be judged defective (*i.e.,* that the benefits of the design in light of the feasibility and costs of an alternative outweigh its risks). *Campbell v General Motors Corp.* (1982) 32 C3d 112, 118, 184 CR 891 (plaintiff's testimony that when bus lurched she reached for handrail, but none was there, created jury question of defective design; expert testimony not required); *Gonzalez v Autoliv ASP, Inc.* (2007) 154 CA4th 780, 64 CR3d 908 (airbag manufacturer failed to produce evidence that benefits of design outweighed risk of injury to passenger's eye); *Ford v Polaris Indus.* (2006) 139 CA4th 755, 775, 43 CR3d 215 (alternative design of personal watercraft would have reduced danger of orifice injuries; see also §11.43); *McCabe v American Honda Motor Co.* (2002) 100 CA4th 1111, 1126, 123 CR2d 303 (automobile airbag failed to deploy in car hit from front; immaterial that plaintiff offered no expert testimony to refute manufacturer's expert's opinion that airbag performed as it was designed to do); *Torres v Xomox Corp*. (1996) 49 CA4th 1, 18, 56 CR2d 455 (jury question whether "single-bolt" design of valve and deficient warnings were substantial factors causing worker's death); *Bernal v Richard Wolf Med. Instruments Corp.* (1990) 221 CA3d 1326, 272 CR 41, disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607 (plaintiff need not prove that reasonable alternative design was feasible). See *Neal v Montgomery Elevator Co.* (1992) 7 CA4th 1194, 9 CR2d 497 (worker lost part of hand while repairing elevator; burden of proof instructions based on *Bernal*).

The risk/benefit test directs the jury to balance several factors and lists competing considerations for the jury to evaluate in deciding the existence of a design defect. *Anderson v Owens-Corning Fiberglas Corp.* (1991) 53 C3d 987, 1001, 281 CR 528. Product label warnings are relevant in determining whether a product has a design defect under the risk/benefit test. *Hansen v Sunnyside Prod., Inc.* (1997) 55 CA4th 1497, 65 CR2d 266 (household cleanser; no impermissible intermingling of risk/benefit design defect theory with failure to warn (see §11.14) theory of liability).

The existence of a safer alternative design may be so self-evident that no expert or other evidence is needed to establish a design defect. See *Pietrone v America Honda Motor Co.* (1987) 189 CA3d 1057, 235 CR 137 (motorcycle). See *Moreno v Fey Mfg. Corp.* (1983) 149 CA3d 23, 196 CR 487 (motorcyclist's evidence that design of truck's rear bumper was substantial factor in amputation of his leg shifted burden to truck manufacturer); *Bates v John Deere Co.* (1983) 148 CA3d 40, 51, 195 CR 637, 644 (evidence of benefit of placing cutoff switch near intake head of cotton-picking machine).

That a product was "state of the art" when it was made is a relevant consideration in determining the existence of a design defect under the risk/benefit test. *Rosburg v Minnesota Mining & Mfg. Co.* (1986) 181 CA3d 726, 226 CR 299 (breast implant; see also §13.4).

Courts have rejected contentions that design defect liability could be based on a conclusion that a product should not have been marketed because risks from its use outweighed any benefit to be derived from it, given the availability of other, safer products. See *Ramirez v Plough, Inc.* (1993) 6 C4th 539, 25 CR2d 97 (children's aspirin alleged to have caused Reye's syndrome); *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 55 CR3d 551 (nasal decongestant ingredient alleged to have caused strokes).

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§11.11 (c) Evidence of Postinjury Design Changes

Evidence that a manufacturer changed the design of or materials used in a product after selling the unit that caused injury is admissible to show that the original design was defective (although not that the manufacturer was negligent). *Ault v International Harvester Co.* (1974) 13 C3d 113, 117 CR 812 (Evid C §1151, excluding evidence of subsequent remedial or precautionary measures, not applicable to strict product liability).

The admissibility of postaccident modifications and warnings is subject to the court's discretion to exclude evidence under Evid C §352 if its probative value is outweighed by its potential for prejudice. *Aguayo v Crompton & Knowles Corp.* (1986) 183 CA3d 1032, 228 CR 768 (exclusion of postaccident manuals and handbooks of defendant/successor corporation and evidence of postaccident modifications).

Evidence that postaccident modifications in a product were made by a nonparty has been admitted to show that the design was defective. See *Magnante v Pettibone-Wood Mfg. Co.* (1986) 183 CA3d 764, 228 CR 420. But see *Santilli v Otis Elevator Co.* (1989) 215 CA3d 210, 263 CR 496 (Evid C §1151 precluded elevator manufacturer, sued for strict liability, from introducing evidence of postaccident safety measures taken by plaintiff's employer to whom jury was asked to assign a fault percentage for negligence).

See Anno, 64 ALR5th 119 (1998) (evidence of repairs or remedial measures by person other than defendant), 15 ALR5th 119 (1993) (evidence of repairs, changed conditions, or precautions).

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§11.12 (d) Other Accidents Involving Same Product

Evidence of other accidents, both prior and subsequent, involving the product that caused the consumer's injury is generally admissible to prove a defective condition, the supplier's knowledge, or the cause of the injury, if the circumstances of the other accidents are similar and not too remote in time. *Ault v International Harvester Co.* (1974) 13 C3d 113, 121, 117 CR 812. See *Elsworth v Beech Aircraft Corp.* (1984) 37 C3d 540, 555, 208 CR 874, 883 (previous spin/stalls of the same and similar model of airplane). See also *Sherman v Kinetic Concepts, Inc.* (1998) 67 CA4th 1152, 79 CR2d 641 (defense judgment reversed for failure to produce, during discovery and trial, records showing other incidents involving same product).

That the braking system of a 1966 car was defective can be shown by evidence of brake failure in the nearly identical 1965 version of that model, together with evidence that changes in the system between those years were insignificant or ineffective. *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 403, 185 CR 654, 663. See references to this case in §11.48. See also *White v Ford Motor Co.* (9th Cir 2002) 312 F3d 998, 1009, modified (9th Cir 2003) 335 F3d 833 (evidence of other parking brake failures in same model vehicle).

A trial judge may also admit a defendant's evidence that there were no other reports of the kind of defect claimed by the plaintiff despite the sale of numerous units of the product. See *Benson v Honda Motor Co.* (1994) 26 CA4th 1337, 32 CR2d 322 (1984 Accord).

See generally Blake, *"Déjà Vu All Over Again"—The Admission and Exclusion of Evidence of Prior and Subsequent Accidents,* 34 CAOC Forum No. 4, p 32 (Consumer Attorneys of California), May 2004.

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§11.13 (e) Absence of Safety Device

Failure to equip the product with a safety device may be a design defect. See *Pike v Frank G. Hough Co.* (1970) 2 C3d 465, 85 CR 629 (earth mover had no rear view mirrors); *Garcia v Halsett* (1970) 3 CA3d 319, 323, 82 CR 420 (washing machine had no safety switch).

Proof that a product did not have a device that would have prevented the injury may require the trial judge to give an instruction that defines "defective product" as including one without such a device. See *Widson v International Harvester Co.* (1984) 153 CA3d 45, 53, 200 CR 136 (no backup warning on large earthmover; product defective if delivered without safety device reasonably necessary to foreseeable use, although device offered as optional equipment); *Titus v Bethlehem Steel Corp.* (1979) 91 CA3d 372, 154 CR 122 (oil-pumping unit had no available safety guard that would have prevented child playing on pump from getting caught in moving parts). Further, it may be error to permit defense counsel to mention and argue "custom and practice" in the industry to sell safety guards as optional equipment; custom or usage are not defenses to strict product liability. 91 CA3d at 378, 154 CR at 126.

See Annos, 99 ALR3d 693 (1980) (seller's obligation to supply or recommend available safety accessories), 95 ALR3d 1066 (1979) (duty to equip product with safety device to protect against patent or obvious danger).

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§11.14 (3) Absence of Adequate Warnings or Instructions

A product is defective when marketed if the manufacturer or supplier failed to include, on the product or its packaging, adequate instructions on safe use, or adequate warnings of dangerous characteristics that are not obvious. See *Anderson v Owens-Corning Fiberglas Corp.* (1991) 53 C3d 987, 995, 281 CR 528 (failure to warn is third category of defect, distinct from manufacturing defects and design defects); *Bresnahan v Chrysler Corp.* (1998) 65 CA4th 1149, 76 CR2d 804 (general verdict for plaintiff could be sustained on failure to warn of risk of air bag injury from sitting too close to steering wheel; immaterial whether design defect instructions were erroneous). Directions or warnings should be supplied where reasonably required to prevent the use of a product from becoming unreasonably dangerous. *Gonzales v Carmenita Ford Truck Sales, Inc.* (1987) 192 CA3d 1143, 1152, 238 CR 18 (warning or instruction may be required even if product is not itself unreasonably or unavoidably dangerous; failure to warn of need, frequency, and method of air brake adjustment on truck). In short, a manufacturer can be strictly liable for failing to give an appropriate and conspicuous warning if it should be aware that the product could be dangerous absent a warning and such a warning is feasible. See *Maneely v General Motors Corp.* (9th Cir 1997) 108 F3d 1176 (applying California law; see also §11.16); *Salyards v Metso Minerals Tampere Oy* (ED Cal 2005) 2005 US Dist Lexis 29360.

Such warnings may include warnings about how the product must be installed in order to avoid an undue risk that it will cause harm. See *Wright v Stang Mfg. Co.* (1997) 54 CA4th 1218, 1236, 63 CR2d 422 (manufacturer of faultlessly made "deck gun" attached to fire engine could be liable to injured firefighter under "warning defect" aspect of strict product liability for failing to warn purchasing fire department against using inadequately strong pipe to mount gun to avoid its separating from truck under foreseeable water supply conditions; see also §11.43). See §13.4 on drugs and implants.

A plaintiff who had an adverse allergic reaction to a substance in a product can establish strict product liability by proving that (1) the offending ingredient is one to which a substantial number of people are allergic, (2) the ingredient is one the consumer would not reasonably expect to find in the product or is one whose danger is not generally known, and (3) the defendant knew of the ingredient's presence and the danger or should have known by the application of reasonable, developed human skill and foresight. *Livingston v Marie Callenders, Inc.* (1999) 72 CA4th 830, 839, 85 CR2d 528 (appellate court rejecting trial judge's view that "there is nothing wrong with … the MSG in the soup," and citing a plethora of cases and Restatement (Second) of Torts §402A, Comment j (1965)).

Thus, a faultlessly made product can be defective if it is not accompanied by adequate warnings or instructions. See, *e.g., Bunch v Hoffinger Indus., Inc.* (2004) 123 CA4th 1278, 1304, 20 CR3d 780 (11-year-old injured in dive into four-foot-deep, aboveground swimming pool; also noted in §§1.50, 11.16, 11.43); *McKinney v Revlon, Inc.* (1992) 2 CA4th 602, 607, 3 CR2d 72 (hair frosting product contained no warning that it contained skin irritant); *Lunghi v Clark Equip. Co.* (1984) 153 CA3d 485, 494, 200 CR 387 (dangerous propensities of machine discovered only after defendant sold it); *Johnson v Standard Brands Paint Co.* (1969) 274 CA2d 331, 79 CR 194 (no warning against unsafe ways to place ladder); *Barth v B.F. Goodrich Tire Co.* (1968) 265 CA2d 228, 242, 71 CR 306, 313 (no warning on effects of underinflating or overloading tires); *Canifax v Hercules Powder Co.* (1965) 237 CA2d 44, 53, 46 CR 552, 558 (dynamite fuses); *Crane v Sears Roebuck & Co.* (1963) 218 CA2d 855, 860, 32 CR 754, 757 (volatile substance).

Liability based on inadequate warning of dangerous characteristics (as opposed to liability for defects in manufacture or in choice of design) arises when the absence of an adequate warning renders the item "substantially dangerous" to the user. *Cavers v Cushman Motor Sales, Inc.* (1979) 95 CA3d 338, 157 CR 142 (instruction approved; no error in excluding, for insufficient foundation, expert's opinion that propensity of golf cart to tip on turns was dangerous characteristic).

A product's conformation to plans furnished by its purchaser does not immunize its manufacturer from liability for design defects or failure to warn of the potential hazards in using it. *Rawlings v D.M. Oliver, Inc.* (1979) 97 CA3d 890, 896, 159 CR 119 (kelp dryer alleged defective for unguarded gears, no shutoff mechanism, and no warnings).

NOTE: The duty to warn of a product's hazards may be nullified when the product is used by the state pursuant to the Emergency Services Act (Govt C §8550). See *Macias v State* (1995) 10 C4th 844, 42 CR2d 592 (child allegedly blinded by malathion sprayed to eliminate medfly could not recover on theory that manufacturer had duty to give health warnings beyond those given by state).

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§11.15 (a) Adequacy of Warning

Warnings are of two kinds: adequate instructions to the consumer on how the product should be used, and information to the consumer (or the physician who prescribes a drug) of the foreseeable risks or side effects that may follow foreseeable uses of the product. *Finn v G.D. Searle & Co.* (1984) 35 C3d 691, 702, 200 CR 870 (plaintiff not prejudiced by instruction that manufacturer had duty to exercise reasonable care to warn medical profession of reasonably foreseeable dangers).

NOTE: It appears that a jury may be instructed to consider whether, after balancing the benefits of giving a warning against the costs (including the danger of "overwarning" based on inconclusive evidence of bad effects), a warning based on information known to the manufacturer would have been appropriate. See §11.10 on risk/benefit analysis in design defect cases.

The adequacy of the warning is judged in light of existing knowledge at the time the product was manufactured. *Rosburg v Minnesota Mining & Mfg. Co.* (1986) 181 CA3d 726, 226 CR 299.

Whether a particular set of warnings is adequate under the circumstances is ordinarily a question of fact. *Torres v Xomox Corp*. (1996) 49 CA4th 1, 22, 56 CR2d 455 (jury question whether deficient warnings were substantial factor causing worker's death); *Salyards v Metso Minerals Tampere Oy* (ED Cal 2005) 2005 US Dist Lexis 29360 (adequacy of instructions on how to replace worn rock crusher dies).

See Annos, 38 ALR5th 683 (1996) (presumption or inference that user would have heeded adequate warning had it been given), 27 ALR5th 697 (1995) (liability for failing to provide product warning in foreign language or accepted pictograph or symbol), 26 ALR4th 377 (1983) (admissibility of expert or opinion evidence on adequacy of warning).

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§11.16 (b) Obvious and Known Dangers; Sophisticated Users

Strict product liability cannot be based on a failure to warn of a danger that is obvious to a purchaser. See *Holmes v J.C. Penney Co.* (1982) 133 CA3d 216, 220, 183 CR 777, 779 (failure to place warning on CO_2 cartridge that others could be harmed if cartridge were used to power pellet gun); *Fierro v International Harvester Co.* (1982) 127 CA3d 862, 866, 179 CR 923, 925 (chassis manufacturer not liable for failing to tell truck assembler that fuel tanks and filler necks needed to be protected from sparks or friction). See also *Maneely v General Motors Corp.* (9th Cir 1997) 108 F3d 1176 (dangers of riding unrestrained in open cargo bed of pickup truck are indisputably obvious to ordinary users); *Blackwell v Phelps Dodge Corp.* (1984) 157 CA3d 372, 378, 203 CR 706, 710 (manufacturer of sulfuric acid had no duty to advise buyer how to unload it from tank car supplied by buyer or to warn of danger of pressure buildup if tank car were defectively designed); *Garman v Magic Chef, Inc.* (1981) 117 CA3d 634, 173 CR 20 (gas stove manufacturer had no duty to warn purchasers that stove flame might ignite gas leaking from another place such as faulty connection between gas line and propane tank); *Stevens v Cessna Aircraft Co.* (1981) 115 CA3d 431, 170 CR 925 (failure of airplane maker to post load capacity in passenger compartment did not give rise to liability, because pilot has responsibility for protecting against overload and relevant information was in owner's manual).

Similarly, the failure to warn of a danger that is generally known and recognized does not, by itself, render a product dangerous. See *Bojorquez v House of Toys, Inc.* (1976) 62 CA3d 930, 133 CR 483 (ten-cent slingshot). See also *Barrett v Atlas Powder Co.* (1978) 86 CA3d 560, 564, 150 CR 339 (failure to warn liability negated by evidence that blasting cap had been in unsupervised storage more than 30 years). Further, there is no duty to warn against a use that is not reasonably foreseeable. *Dosier v Wilcox-Crittendon Co.* (1975) 45 CA3d 74, 81, 119 CR 135, 139.

A manufacturer that convinces a court that the person allegedly injured by its product could reasonably be expected to have known of a hazard connected with its use is not liable for failing to warn of it. *Johnson v American Standard, Inc.* (2008) 43 C4th 56, 64, 74 CR3d 108 (sophisticated-user defense applied; trained, certified, experienced air-conditioning technician should have known not to subject line containing refrigerant to high heat).

Whether danger posed by a product is open and obvious, however, may vary under the circumstances. See *Bunch v Hoffinger Indus., Inc.* (2004) 123 CA4th 1278, 1294, 20 CR3d 780 (danger of diving into four-foot-deep, aboveground swimming pool not necessarily obvious to 11-year-old; also noted in §§1.50, 11.14, 11.43).

See Anno, 35 ALR4th 861 (1985) (status of rule barring liability for patent or obvious dangers).

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§11.17 (c) Manufacturer's Knowledge; State-of-the-Art Evidence; Others' Products

When a products liability action is based *solely* on an alleged failure to adequately warn of a risk of harm, the defendant is entitled to present evidence of the state of the art, *i.e.,* that the particular risk was neither known nor knowable by the application of scientific knowledge available at the time of manufacturing or distribution. See *Anderson v Owens-Corning Fiberglas Corp.* (1991) 53 C3d 987, 997, 281 CR 528 (manufacturer not liable for unknown and unknowable characteristics).

The manufacturer of a nondefective product that is used with other suppliers' defective products has no duty to warn of defects in the other products. *Taylor v Elliott Turbomachinery Co.* (2009) 171 CA4th 564, 90 CR3d 414 (machine maker was not part of chain of distribution of products that emitted asbestos fibers).

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§11.18 (d) Postaccident Warnings

Evidence that, after the plaintiff was injured, the manufacturer issued a warning about using the product is admissible to show that the preaccident failure to warn made the product defective. *Schelbauer v Butler Mfg. Co.* (1984) 35 C3d 442, 449, 198 CR 155 (Evid C §1151) no bar; rationale of *Ault v International Harvester Co.* (1974) 13 C3d 113, 117 CR 812 (see §11.11), applied). See *Burke v Almaden Vineyards, Inc.* (1978) 86 CA3d 768, 150 CR 419 (plastic champagne cork popped out and injured plaintiff's eye; evidence that marketer later attached warning label tends to show existence of subtle defect and that attaching warning was feasible).

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Source: Torts/California Tort Guide/11 Product Liability/§11.19 (4) Pharmaceuticals; Medical Implants and Devices [Deleted]

§11.19 (4) Pharmaceuticals; Medical Implants and Devices [Deleted]

The text of this section has been deleted, because new chapter 13 is devoted entirely to pharmaceuticals and medical implants and devices. Some drug and devices cases have been retained in other sections of this chapter as support for statements related to all products.

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§11.20 3. Defect Caused Injury or Damage

To recover on the strict liability theory, the plaintiff must prove that a defect in the product was a legal cause (see §1.15) of injury or damage. *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 704, 106 CR 1, 11. See *Horn v General Motors Corp.* (1976) 17 C3d 359, 366, 131 CR 78; *Cronin v J.B.E. Olson Corp.* (1972) 8 C3d 121, 127, 104 CR 433 (defect must be a substantial factor (see §1.14) contributing to plaintiff's injuries). See also *Arambula v Union Carbide Corp.* (2005) 128 CA4th 333, 26 CR3d 854 (plaintiff failed to identify any defendant product that could have caused decedent's asbestos disease); *Setliff v E.I. Du Pont De Nemours & Co.* (1995) 32 CA4th 1525, 38 CR2d 763 (plaintiff's failure to identify which of several paints and solvents caused injury basis of summary judgment; alternative liability theory inapplicable); *Stilwell v Smith & Nephew, Inc.* (9th Cir 2007) 482 F3d 1187 (expert testimony, even if it had not erroneously been excluded, failed to demonstrate that any defect in reconstruction nails caused delay in healing of fractured leg).

Damages cannot be recovered under either a strict product liability or negligence theory unless a defect in the product has caused actual personal injury or property damage. *Khan v Shiley, Inc.* (1990) 217 CA3d 848, 266 CR 106 (summary judgment against patient who suffered emotional distress on being told that her artificial heart was type that had propensity to fracture; no injury would be "caused by the defect" until her particular valve failed). See *San Francisco Unified Sch. Dist. v W.R. Grace & Co.* (1995) 37 CA4th 1318, 44 CR2d 305 (statute of limitation began to run, not when district discovered that that asbestos had been used in its buildings, but when actual asbestos contamination occurred). "Economic" damages, standing alone, unaccompanied by any injury to person or property, are recoverable only when a special relationship exists between the parties. See *Fieldstone Co. v Briggs Plumbing Prods., Inc.* (1997) 54 CA4th 357, 367, 62 CR2d 701 (noted in §11.24); *Ott v Alfa-Laval Agri, Inc.* (1995) 31 CA4th 1439, 1455, 37 CR2d 790 (economic damages not recoverable absent showing that milking system was "intended to affect" plaintiffs in way peculiar to them).

Standards for pleading and proving causation when harm was caused by long-term exposure to products containing multiple toxic substances are set out in *Bockrath v Aldrich Chem. Co.* (1999) 21 C4th 71, 80, 86 CR2d 846 (proof that product was substantial factor (see §1.14) in bringing about injury must be to reasonable medical probability; pleading requirements include identifying each product, the toxins it contained, and the specific illnesses resulting from exposure).

In suits against the suppliers of products containing asbestos, it is error to give jury instructions that, in effect, shift to each defendant the burden of proving that its products were *not* a legal cause of the injury. *Rutherford v Owens-Illinois, Inc.* (1997) 16 C4th 953, 957, 67 CR2d 16 (asbestos-related cancer plaintiff has burden of proving "no more than" that exposure to defendant's asbestos products was, in reasonable medical probability, substantial factor in causing or contributing to his or her risk of developing cancer); *Kennedy v Southern Cal. Edison Co.* (9th Cir 2001) 268 F3d 763, 767 (required contents of "*Rutherford*" jury instruction in case involving wife's death from exposure to nuclear fuel particles husband unknowingly carried home on clothing and body; see §11.45). Conversely, a jury assignment of a fault percentage of 1.95 to a particular manufacturer of asbestos products does not negate a finding that those products were a substantial factor in causing the plaintiff's injury. See *Jones v John Crane, Inc.* (2005) 132 CA4th 990, 1001, 35 CR3d 144 (navy man exposed to asbestos from numerous manufacturers during career).

An unforeseeable alteration of the product after it has left a defendant's possession, or misuse by the consumer, can, but does not always, rise to the level of a superseding cause that would bar recovery. See *Torres v Xomox Corp*. (1996) 49 CA4th 1, 17, 56 CR2d 455 (evidence supported jury conclusion that buyer's modification of valve was neither sole cause nor superseding cause of valve's spewing acid on worker).

NOTE: Causation principles applicable to negligence liability (see §§1.14-1.18) are also applied in product liability cases. See *Southern Cal. Edison Co. v Harnischfeger Corp.* (1981) 120 CA3d 842, 852, 175 CR 67 (concurrent causation; intervening or superseding cause); *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 804, 174 CR 348 (substantial factor instruction adequate to raise superseding cause issue). See also *Garcia v Joseph Vince Co.* (1978) 84 CA3d 868, 873, 148 CR 843 (plaintiff nonsuited when defective fencing saber that had been made by one of two defendant manufacturers was lost and plaintiff produced no evidence to show which of two had made it). See Anno, 51 ALR3d 1344 (1973) (need to identify defendant as marketer of injury-causing product). See discussion of "market share" liability in §11.22.

In pharmaceutical cases, plaintiff must prove—within a reasonable medical probability based on competent expert testimony—that the drug caused the injury. See §9.10.

In California state courts, the admissibility of "scientific" testimony is not governed by the test listed in *Daubert v Merrell Dow Pharm., Inc.* (1993) 509 US 579, 125 L Ed 2d 469, 113 S Ct 2786. California adheres to a "Kelly-Frye" admissibility test stated in *People v Kelly* (1976) 17 C3d 24, 130 CR 144. See *Roberti v Andy's Termite & Pest Control, Inc.* (2003) 113 CA4th 893, 6 CR3d 827 (trial court erred when it excluded testimony by toxicologists and medical doctors that pre- and postnatal exposure to particular pesticide used to fumigate house caused child's autism; see §1.16).

In federal courts, the *Daubert* test may be applied to exclude expert evidence that product defects caused the plaintiff's injury. See §11.8. See *Cabrera v Cordis Corp.* (9th Cir 1998) 134 F3d 1418 (court properly excluded opinion testimony that silicone in hydrocephalus shunt caused plaintiff's allergies). But see *Stilwell v Smith & Nephew, Inc.* (9th Cir 2007) 482 F3d 1187, 1188 (lower court erroneously applied *Daubert* to exclude plaintiff's expert's testimony; but see note on this case, above); *Kennedy v Collagen Corp.* (9th Cir 1998) 161 F3d 1226 (summary judgment for manufacturer of wrinkle reduction product alleged to have caused autoimmune disease reversed; lower court improperly applied *Daubert* standards to exclude plaintiff's expert's testimony).

A similar "reasonable medical probability" standard has also been applied in strict product liability suits for injury following exposure to asbestos. See *Sparks v Owens-Illinois, Inc.* (1995) 32 CA4th 461, 476, 38 CR2d 739 (evidence sufficient to establish that defendant's product was sole cause of plaintiff's mesothelioma); *Lineaweaver v Plant Insulation Co.* (1995) 31 CA4th 1409, 37 CR2d 902 (evidence sufficient to establish that one plaintiff's (but not two others') exposure to asbestos could have resulted in his asbestosis). On determining the date on which injury from asbestosis or other latent, progressive conditions is deemed to have occurred, for purposes of ascertaining whether Proposition 51 (CC §1431.2) applies, see §1.69.

Circumstantial evidence may prove that a defect existed and caused the plaintiff's injuries, and causation may be inferred from such evidence. *Elmore v American Motors Corp.* (1969) 70 C2d 578, 584, 75 CR 652, 655; *Dimond v Caterpillar Tractor Co.* (1976) 65 CA3d 173, 134 CR 895.

The plaintiff's evidence need afford only a reasonable basis for concluding that it is more likely than not that the defect caused injury; conclusive proof or proof beyond a reasonable doubt is not required. *Grinnell v Charles Pfizer & Co.* (1969) 274 CA2d 424, 435, 79 CR 369, 374. See *Arthur v Avon Inflatables, Ltd.* (1984) 156 CA3d 401, 408, 203 CR 1, 5 (absence of emergency transmitter and other safety equipment on life raft; enough that plaintiff's evidence proved that distress signals *could* (not *would*) have been heard). But see *Minder v Cielito Lindo Restaurant* (1977) 67 CA3d 1003, 1008, 136 CR 915 (proof that plaintiff became ill after eating at restaurant does not, by itself, establish that bad food caused the illness).

Reasonable inferences drawn from substantial evidence are available to show causation regarding a product, even a food product alleged to have caused food poisoning. *Sarti v Salt Creek Ltd.* (2008) 167 CA4th 1187, 85 CR3d 506 (questioning whether *Minder v Cielito Lindo Restaurant, supra,* supports a rule that inferences are unavailable in food poisoning cases, or that food poisoning defendants are accorded special, protected status).

That a product had been in use for many years and had experienced wear and tear does not preclude a finding that defects in the product's design and construction caused the plaintiff's injuries. See *Akers v Kelley Co.* (1985) 173 CA3d 633, 651, 219 CR 513, 524, disapproved on other grounds at 16 C4th 582 n5 (manufacturer should anticipate damage to forklift dockboard during normal operation).

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§11.21 (a) Product's "Crashworthiness"

The product defect must have been the cause of the injuries (or damage), but it need not have been the cause of the collision or accident in which the injuries were incurred; manufacturers must take accidents into consideration as reasonably foreseeable occurrences involving their products; they may not carry out the design and manufacture of products in an industrial vacuum, but should recognize the realities of their everyday use. *Cronin v J.B.E. Olson Corp.* (1972) 8 C3d 121, 126, 104 CR 433. See *McGee v Cessna Aircraft Co.* (1983) 139 CA3d 179, 190, 188 CR 542 (fire in airplane cabin after crash could have resulted from either severity of crash or defects in design of the firewall between engine and cabin).

A vehicle manufacturer, for example, has a duty to design and make an automobile so as to prevent any aggravation of injuries resulting from a collision, and is liable to the extent that a design defect caused plaintiff to sustain greater injuries than would have been sustained without the defect. *Horn v General Motors Corp.* (1976) 17 C3d 359, 366, 131 CR 78. It must be the defect, however, that caused the injury, not the collision. The evidence may entitle the vehicle manufacturer to have the jury instructed that any alleged design defect was not a substantial or contributing cause of the plaintiff's "enhanced" injuries (the additional injury alleged to have resulted from the vehicle's noncrashworthiness) if the same injuries would have occurred even with a nondefective design. *Soule v General Motors Corp.* (1994) 8 C4th 548, 572, 34 CR2d 607 (car driver injured by chassis deformation following collision; noted in §11.9).

The plaintiff cannot recover if the evidence shows that the violence of the crash (not caused by product defect) was the overriding cause of the injuries. See *Doupnik v General Motors Corp.* (1990) 225 CA3d 849, 864, 275 CR 715; *Endicott v Nissan Motor Corp.* (1977) 73 CA3d 917, 926, 141 CR 95, 100 (evidence did not show that rupture of seatbelt made injuries worse); *Self v General Motors Corp.* (1974) 42 CA3d 1, 9, 116 CR 575, 580, overruled on other grounds at 8 C4th 580 (crash was effective cause of injuries, superseding defective design). See also *Visueta v General Motors Corp.* (1991) 234 CA3d 1609, 1615, 286 CR 402 (defective maintenance of parking brake and driver's failure to attempt to use it were causes, not defective design); *Fierro v International Harvester Co.* (1982) 127 CA3d 862, 867, 179 CR 923 (plaintiff's proffered instruction on crashworthiness incorrectly sought to impose liability on chassis manufacturer for failure to design against fuel tank rupture in high-speed crash, failing to recognize truck fabricator's activity as superseding cause).

See Annos, 69 ALR5th 625 (1999) (driver's comparative negligence as defense to crashworthiness, enhanced injury, or second collision claim), 48 ALR5th 1 (1997) (defective automobile seatbelt or other restraint); 9 ALR4th 494 (1981) (proof of injury from "second collision").

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§11.22 b. Market Share Liability

Sindell v Abbott Labs. (1980) 26 C3d 588, 611, 163 CR 132, 144—a case in which the plaintiff sued several companies, alleging that together they produced 90 percent of the drug DES marketed at the time plaintiff's mother took the doses that injured plaintiff—establishes an exception to the usual rule that a plaintiff must show that the particular defective item that caused the injury was marketed by the defendant or defendants. Under *Sindell,* a plaintiff can recover on a proportional basis from members of the group of producers if

- the injuries were caused by a drug, individual batches or doses of which were produced from an identical formula by several manufacturers;
- the injuries were caused by a defect common to all batches of the product (because, *e.g.,* the common formula or design was defective in view of the use for which the product was marketed (see 26 C3d at 603 n18));
- the plaintiff, through no fault of his own, cannot identify the producer of the particular batch that caused the injuries; and
- the plaintiff sues the defendants who marketed a "substantial" share of the batches from which the injurious dose must have come.

Each defendant that could have produced the injury-causing dose must pay damages in proportion to its "share of the market," as determined by the trier of fact. A defendant may escape liability by proving that it could not have been the source of the particular dose that injured the plaintiff, or may spread liability by cross-complaining against other producers who might have supplied the product. 26 C3d at 612. See *Morris v Parke, Davis & Co.* (CD Cal 1987) 667 F Supp 1332, 1340 (suit against manufacturers of DPT vaccine).

Products other than drugs may give rise to market share liability. See *Wheeler v Raybestos-Manhattan* (1992) 8 CA4th 1152, 11 CR2d 109 (workers who contracted asbestos disease from changing brake pads could assert theory against brake pad manufacturers). But see *Andrews v Foster Wheeler LLC* (2006) 138 CA4th 96, 41 CR3d 229 (plaintiff neither had, nor could obtain, evidence showing exposure to particular defendant's asbestos products); *Ferris v Gatke Corp.* (2003) 107 CA4th 1211, 132 CR2d 819 (shipyard and brake shoe worker who suffered asbestos-related injury failed to come within *Wheeler* exception by showing that products he used had similar formulation and toxicity and contained same kind of asbestos fibers); *Chavers v Gatke Corp.* (2003) 107 CA4th 606, 132 CR2d 198 (brake shoe material manufacturer not liable absent showing that plaintiff had been exposed to that particular manufacturer's products); *McGonnell v Kaiser Gypsum Co., Inc.* (2002) 98 CA4th 1098, 120 CR2d 23 (no evidence that decedent was exposed to defendant's asbestos products); *Edwards v A.L. Lease & Co.* (1996) 46 CA4th 1029, 1034, 54 CR2d 259 (market share inapplicable to drain pipe defective because of manufacturing defect created during particular period by single manufacturer, even though plaintiff did not know which of several possible manufacturers was responsible); *Setliff v E.I. Du Pont De Nemours & Co.* (1995) 32 CA4th 1525, 38 CR2d 763 (plaintiff's failure to identify which of several paints and solvents caused injury basis of summary judgment; market share liability theory inapplicable because products not fungible).

The plaintiff must have sued the producers of a "substantial share" of product from which the offending item might have come. See *Murphy v E.R. Squibb & Sons, Inc.* (1985) 40 C3d 672, 221 CR 447 (market share theory does not support suit against single manufacturer who had only 10-percent market share, nor does theory apply to pharmacists who sell prescription drugs). The joinder of manufacturers of a substantial percentage of the market is essential to shift the burden of proof of causation to the defendants. See *Miles Labs. v Superior Court* (1982) 133 CA3d 587, 184 CR 98 (drug company's affidavit that it sold DES for use by males only was insufficient to negate its liability for market share of DES sales to females). See also *Sheffield v Lilly* (1983) 144 CA3d 583, 192 CR 870 (market share theory inapplicable unless manufacturing defect that caused injury was present in products of all defendants). But see *Morris v Parke, Davis & Co.* (CD Cal 1987) 667 F Supp 1332, 1339 (no preemption by National Childhood Vaccine Injury Act of 1986 (42 USC §§300aa-1-300aa-33) of manufacturing defects suit against manufacturers of DPT vaccine).

Sindell did not open the door to imposing "enterprise liability" on the manufacturer, on allegations that it participated with other manufacturers of similar products in a "civil conspiracy" or "concert of action" to conceal the dangers posed by materials in such products. See *Ferris v Gatke Corp., supra* (brake shoes); *Chavers v Gatke Corp., supra* (same).

The supreme court's decision in *Sindell* did not revive claims that were otherwise barred by the statute of limitations. *Jolly v Eli Lilly & Co.* (1988) 44 C3d 1103, 245 CR 658 (filing of class action does not generally toll statute for consumers injured by same product). See *Kennedy v Baxter Healthcare Corp.* (1996) 43 CA4th 799, 50 CR2d 736 (class action inappropriate for claims by many health care workers for injury caused by latex gloves; market share

theory also inapplicable). See also *Valentino v Carter-Wallace, Inc.* (9th Cir 1996) 97 F3d 1227 (nationwide plaintiff class certified; drug for treating epilepsy).

In a market share action, each defendant is severally liable to the plaintiff for only that defendant's market share percentage of the plaintiff's damages. *Brown v Superior Court* (1988) 44 C3d 1049, 1072, 245 CR 412.

Punitive damages may not be awarded in an action based on the market share theory. *Magallanes v Superior Court* (1985) 167 CA3d 878, 213 CR 547. But see *Morris v Parke, Davis & Co.* (CD Cal 1983) 573 F Supp 1324 (punitive damages recoverable under market share liability).

See Anno, 63 ALR5th 195 (1998) ("enterprise liability," "concert of activity," and similar theories for imposing liability absent identification of maker of particular unit or batch).

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4. Consumer's Harm or Loss; Damages

§11.23 a. Bodily Injury; Wrongful Death; Emotional Distress

The strict product liability theory appears to permit recovery of all forms of personal injury and wrongful death damages. See *Barrett v Superior Court* (1990) 222 CA3d 1176, 272 CR 304 (wrongful death). See also *Gutierrez v Cassiar Mining Corp.* (1998) 64 CA4th 148, 75 CR2d 132 (damages for future medical monitoring; defendant entitled to jury instruction on whether exposure to asbestos products or smoking and tuberculosis created need). For extensive discussion of the nature and extent of personal injury and death damages, see California Tort Damages (2d ed Cal CEB 2002).

Damages are also recoverable for emotional shock and other detriment resulting from viewing the injury or death of a close relative. *Shepard v Superior Court* (1977) 76 CA3d 16, 20, 142 CR 612. Further, the emotional distress of users of a defective product is compensable if they are the direct victims of injury caused by the product to another. See *Kately v Wilkinson* (1983) 148 CA3d 576, 585, 195 CR 902 (mother and daughter could recover damages for distress of seeing daughter's friend injured when steering wheel of boat driven by mother locked and boat circled and struck the friend). But see *Gu v BMW of N. Am., LLC* (2005) 132 CA4th 195, 33 CR3d 617 (car buyer, not present when sister injured in collision, not entitled to emotional distress damages against seller for allegedly defective head protection system).

See Anno, 31 ALR4th 162 (1984) (strict product liability for emotional distress from witnessing injury to another). On bases for recovering emotional distress damages, see Tort Damages, chap 6.

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Source: Torts/California Tort Guide/11 Product Liability/§11.24 b. Property Damage; Commercial Loss

§11.24 b. Property Damage; Commercial Loss

California law permits a strict product liability plaintiff to recover damages for physical damage to property, including, it appears, harm to the defective product itself. See *Seely v White Motor Co.* (1965) 63 C2d 9, 19, 45 CR 17, 24 (damage to truck that rolled over, but economic losses such as lost profits or purchase price of truck recoverable only by proving breach of express warranty); *Stearman v Centex Homes* (2000) 78 CA4th 611, 92 CR2d 761 (homeowners could recover damages for all harm to house resulting from defective foundation plus fees of experts employed to investigate defects; "economic damages" restriction not applicable, even though only damage was to house of which foundation was component part); *Transwestern Pipeline Co. v Monsanto Co.* (1996) 46 CA4th 502, 523, 53 CR2d 887 (pipeline company could recover damages under strict product liability from manufacturer of contaminated gas for costs of remediating the contamination; damages were for property damage, not economic loss); *Gherna v Ford Motor Co.* (1966) 246 CA2d 639, 649, 55 CR 94, 101 (car damaged by wiring defect). See also *KB Home v Superior Court (Consolidated Ind. Corp.)* (2003) 112 CA4th 1076, 5 CR3d 587 (strict liability and negligence claim against furnace manufacturer; builder entitled to prove that defect in furnace component was sufficiently different from furnace itself so that furnace was "other property" and "economic loss rule" did not apply). For additional cases, see §§6.14, 11.37. On the other hand, cases have held that that there can be no tort recovery for damage to the defective product itself when the defect and the damage are one and the same. See *Fieldstone Co. v Briggs Plumbing Prods., Inc.* (1997) 54 CA4th 357, 363, 62 CR2d 701 (no tort damages recoverable by builder from manufacturer when 1900 sinks began to chip and rust prematurely; also, builder was "sophisticated consumer"—see §11.27); *Sacramento Regional Transit Dist. v Grumman Flxible* (1984) 158 CA3d 289, 294, 204 CR 736 (although damaged property may consist of product itself, no tort recovery for injury to property that was "the manifestation of the defect itself"—cracked fuel tank supports—or for costs of repair or for loss of use or profits). See also *Virginia Sur. Co. v American Eurocopter Corp.* (D Haw 1996) 955 F Supp 1213, 1216, which states, citing *Sacramento Regional Transit Dist.,* that California permits recovery for the "economic loss of damage to the product itself" while barring recovery for purely economic loss, such as loss of profits. See §11.20 on recovery for defects that have not yet damaged the product (houses).

NOTE: Under federal maritime law, a plaintiff suing a manufacturer that supplied a defective product cannot recover damages for the physical damage that the defective product causes to the "product itself," but may recover damages for physical damage to "other property," including components added to the product after the product was conveyed from the manufacturer to the original user. See *Saratoga Fishing Co. v J. M. Martinac & Co. & Marco Seattle, Inc.* (1997) 520 US 875, 138 L Ed 2d 76, 117 S Ct 1783; *All Alaskan Sea Foods, Inc. v Raychem Corp.* (9th Cir 1999) 197 F3d 992 (component supplier's liability for fire damage to ship).

Commercial and economic detriment, such as loss of bargain and loss of use, even though it results in loss of business, is governed by contract (sales) law, and damages are not recoverable from a manufacturer under a strict product liability theory. See *Seely v White Motor Co.* (1965) 63 C2d 9, 15, 45 CR 17, 21; *American Suzuki Motor Corp. v Superior Court* (1995) 37 CA4th 1291, 44 CR2d 526 (no strict product liability absent injury to person or property); *Anthony v Kelsey-Hayes Co.* (1972) 25 CA3d 442, 447, 102 CR 113, 116. See also *LAVWMA v Northwest Pipe & Casing Co.* (ND Cal 1995) 915 F Supp 1066, 1070 (allegations that pipe was defective, requiring repair or replacement, alleged economic loss not recover able under strict liability); *Department of Water & Power v ABB Power T & D* (CD Cal 1995) 902 F Supp 1178, 1186 n4 ("economic loss" is damages for inadequate value, costs of repair and replacement of the defective product or consequent loss of profits, without any claim of personal injury or damage to other property).

On the other hand, damages for economic loss (as well as punitive damages) can be obtained from a product manufacturer whose intentional misrepresentation or fraud in the performance of a contract caused the loss. *Robinson Helicopter Co. v Dana Corp.* (2004) 34 C4th 979, 990, 22 CR3d 352 (manufacturer furnished buyer with false certificates of compliance with government specifications).

The demarcation between tort theory and contract theory reflects the difference between recoverable damages for physical injury to property and nonrecoverable economic loss (*e.g.,* damages for inadequate value, costs of repair and replacement of the defective product, and consequent loss of profits). See *Sacramento Regional Transit Dist. v Grumman Flxible, supra.* See also *Pisano v American Leasing* (1983) 146 CA3d 194, 194 CR 77 (recovery permitted to cabinetmaker for damage to cabinets caused by defective sander, but not, under strict product liability, for lost profits or business opportunities).

Damages for economic losses have been permitted in certain product liability situations. See, *e.g., Ales-Peratis*

Foods Int'l v American Can Co. (1985) 164 CA3d 277, 289, 209 CR 917, 924 (recovery allowed for economic losses caused by defective product). See also *D'Aquisto v Campbell Indus.* (1984) 162 CA3d 1208, 1214, 209 CR 108, 111; *Rodrigues v Campbell Indus.* (1978) 87 CA3d 494, 498, 151 CR 90 (fishing boat crew who lost earnings and share of catch when vessels broke down permitted to sue manufacturer and repair facility under federal maritime law); *Charles D. Warner & Sons v Seilon, Inc.* (1974) 37 CA3d 612, 112 CR 425 (damages for value of truck plus loss of use recovered for breach of warranty).

The purchaser of a product who proves that he suffered damages as the result of a defect (determined under strict product liability rules) can offset the damages against liability on the note given to purchase the product. *Hughes Tool Co. v Max Hinrichs Seed Co.* (1980) 112 CA3d 194, 169 CR 160.

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§11.25 c. Punitive Damages

Exemplary (punitive) damages may be awarded in a product liability action if the defendant was guilty of express or implied oppression, fraud, or malice. See CC §3294; *G.D. Searle & Co. v Superior Court* (1975) 49 CA3d 22, 26, 122 CR 218 (action for alleged adverse physical effects of oral contraceptive); *Hopkins v Dow Corning Corp.* (9th Cir 1994) 33 F3d 1116, 1126 (silicone gel breast implant maker continued selling them despite knowledge of possible hazards).

Punitive damages are an effective remedy for consumer protection against defectively designed mass-produced articles, and evidence that a manufacturer put a car on the market knowing that a change in design at minimal cost would have made the car safer showed a conscious and callous disregard of public safety sufficient to establish the "malice" required for such damages. *Grimshaw v Ford Motor Co.* (1981) 119 CA3d 757, 807, 174 CR 348. See *Hilliard v A.H. Robins Co.* (1983) 148 CA3d 374, 395, 196 CR 117, 130 (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 when houses came with defective polybutylene plumbing systems).

For discussion of punitive damages in a vehicle rollover case, see *Romo v Ford Motor Co.* (2003) 113 CA4th 738, 6 CR3d 793. For a comprehensive discussion of punitive damages in personal injury and wrongful death cases, see California Tort Damages, chap 14 (2d ed Cal CEB 2002).

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C. Persons Who May Recover

§11.26 1. Purchaser, User, Bystander, Employer

Strict product liability may be invoked not only by consumers and users of a product, but also by anyone to whom an injury from the defect is reasonably foreseeable. See *Silverhart v Mount Zion Hosp.* (1971) 20 CA3d 1022, 1026, 98 CR 187 (patient injured when surgical needle broke). Thus, there may be recovery for injury to the following:

- The purchaser of the product or a family member (see *Greenman v Yuba Power Prods., Inc.* (1963) 59 C2d 57, 64, 27 CR 697, 701 (purchase by plaintiff's wife); *Vandermark v Ford Motor Co.* (1964) 61 C2d 256, 258, 37 CR 896, 898 (purchaser driving and sister riding in car));
- The ultimate user or consumer in the broadest sense of the term (see *Garcia v Halsett* (1970) 3 CA3d 319, 325, 82 CR 420 (11-year-old patron in launderette); *Canifax v Hercules Powder Co.* (1965) 237 CA2d 44, 54, 46 CR 552, 558 (employees of purchaser); see Restatement (Second) of Torts §402A, comment l (1965); Prosser, *Strict Liability to the Consumer in California,* 18 Hastings LJ 9, 30 (1966); Anno, 13 ALR3d 1057, 1093 (1967));
- The owner of property harmed by a defective product used or stored on adjacent property (*Nelson v Superior Court* (2006) 144 CA4th 689, 50 CR3d 684 (owner alleged that additive in gasoline that leaked from neighboring gas station damaged and poisoned his water system; strict liability extends to manufacturer that could reasonably anticipate it would be stored in tanks and in vehicles));
- A bystander who was neither the purchaser nor the user (*Elmore v American Motors Corp.* (1969) 70 C2d 578, 586, 75 CR 652, 656 (occupant of another vehicle struck by defective car); *Preissman v Ford Motor Co.* (1969) 1 CA3d 841, 850, 82 CR 108 (pedestrian struck by runaway car); *Johnson v Standard Brands Paint Co.* (1969) 274 CA2d 331, 337, 79 CR 194, 200 (bystander hit by ladder)); or
- The employer (or insurer) that paid workers' compensation benefits to an employee injured by a defective product (*Lewis v American Hoist & Derrick Co.* (1971) 20 CA3d 570, 585, 97 CR 798).

On the other hand, a person who buys a product for the sole purpose of suing sellers on allegations they had mislabeled it has not been "injured in fact" and thus lacks standing to pursue the suit. See *Buckland v Threshhold Enters., Inc.* (2007) 155 CA4th 798, 66 CR3d 543 (director of women's law center initiated suit regarding creams and lotions she bought).

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§11.27 2. Corporations; Large Purchasers

Strict product liability theory has been held inapplicable to parties that (1) deal in a commercial setting, (2) are in a position of relatively equal economic strength, (3) bargain specifications of the product, and (4) negotiate the risk of loss from product defects. See *Aris Helicopters, Ltd. v Allison Gas Turbine* (9th Cir 1991) 932 F2d 825, 827 (helicopter defect resulting in damage to helicopter and loss of income); *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v Walter Kidde & Co.* (9th Cir 1982) 690 F2d 1235, 1240 (theory not applicable to disputes between large corporate enterprises that have allocated risks by contract); *Department of Water & Power v ABB Power T & D* (CD Cal 1995) 902 F Supp 1178, 1182; *Kaiser Steel Corp. v Westinghouse Elec. Corp.* (1976) 55 CA3d 737, 747, 127 CR 838 (large institutional users that can control design and fabrication of product by contract have no need for, and cannot rely on, strict product liability). See also *Sacramento Regional Transit Dist. v Grumman Flxible* (1984) 158 CA3d 289, 295, 204 CR 736 (merchant, as defined in Com C §2104, cannot proceed on either strict product liability or negligence theories to recover economic loss). See §11.24 (damages for commercial loss), §11.62 (warranty liability). On the other hand, a large institutional product purchaser that is *not* in a position to control the design and fabrication of the product can sue a seller for strict product liability. *Southern Cal. Edison Co. v Harnischfeger Corp.* (1981) 120 CA3d 842, 855, 175 CR 67 (distinguishing *Kaiser Steel Corp. v Westinghouse Elec. Corp., supra*); *International Knights of Wine, Inc. v Ball Corp.* (1980) 110 CA3d 1001, 1006, 168 CR 301.

A commercial entity held strictly liable in tort for injuries to a consumer may obtain comparative equitable indemnity against another commercial entity. *GEM Developers v Hallcraft Homes, Inc.* (1989) 213 CA3d 419, 261 CR 626. See also *Gentry Constr. Co. v Superior Court* (1989) 212 CA3d 177, 260 CR 421 (multiple tortfeasors who are strictly liable to same plaintiff can seek comparative indemnity from each other or from negligent tortfeasors). A tortfeasor cannot obtain equitable indemnity, however, from a person or entity that is not a joint tortfeasor. See *BFGC Architects Planners v Forcum/Mackey Const. Co.* (2004) 119 CA4th 848, 14 CR3d 721 (architects sued by property owner for furnishing defective plans could not obtain equitable indemnity from contractors whose duties, if any, were separately owed to owner).

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§11.28 3. Supplier's Employee

Under the workers' compensation exclusive remedy rule, the manufacturer or other supplier of a defective product may claim immunity from damages liability to its employee *unless,* before the injury, the product was sold, leased, or otherwise transferred for valuable consideration to an independent third person and thereafter was provided for the injured person's use by that third person. Lab C §3602(b)(3).

For discussion of "product" exceptions to workers' compensation exclusivity, see California Workers' Damages Practice §4.57 (2d ed Cal CEB 2001).

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D. Persons Who May Be Liable

§11.29 1. Persons Engaged in Marketing Enterprise

A person or an entity that is an integral part of the business enterprise of marketing a product is liable for injury caused by defects in the product even though that marketer did not create or know of the defect. *Vandermark v Ford Motor Co.* (1964) 61 C2d 256, 262, 37 CR 896, 899; *Kasel v Remington Arms Co.* (1972) 24 CA3d 711, 723, 101 CR 314. That is, the injured person may sue any one or more of those in the defective product's "chain of distribution," leaving it to the ones sued to seek indemnity from others in the chain. See §11.40.

A defendant can avoid liability by showing that it did not manufacture or supply the particular product alleged to have been defective. See *DiCola v White Bros. Performance Prods., Inc.* (2008) 158 CA4th 666, 674, 69 CR3d 888 (plaintiff's evidence failed to refute defendants' evidence that allegedly defective motorcycle side stand did not come from defendants).

Proposition 51 (CC §1431.2; see §1.69) does not permit a sued defendant, by asking for an allocation of fault among those in the distributional chain, to avoid liability for all a plaintiff's noneconomic damages. *Wimberly v Derby Cycle Corp.* (1997) 56 CA4th 618, 65 CR2d 532. All entities in a particular product's chain of distribution share a single fault percentage, although when two or more different products cause an injury, separate percentages must be allocated to the chains for each. *Arena v Owens-Corning Fiberglas Corp.* (1998) 63 CA4th 1178, 74 CR2d 580, followed in *Wilson v John Crane, Inc.* (2000) 81 CA4th 847, 857, 97 CR2d 240 (evidence provided basis for allocating liability for noneconomic damages among various manufacturers of asbestos products). See *Bostick v Flex Equip. Co.* (2007) 147 CA4th 80, 93, 54 CR3d 28 (manufacturer of exercise device and gym where user was injured treated as single entity for Proposition 51 purposes).

Those subject to strict product liability include the following:

- A manufacturer (*Greenman v Yuba Power Prods., Inc.* (1963) 59 C2d 57, 62, 27 CR 697, 701);
- A retail dealer (*Vandermark v Ford Motor Co.* (1964) 61 C2d 256, 37 CR 896);
- A wholesaler (*Canifax v Hercules Powder Co.* (1965) 237 CA2d 44, 52, 46 CR 552, 558);
- A distributor who acted as a conduit for the sale (*Barth v B.F. Goodrich Tire Co.* (1968) 265 CA2d 228, 250, 71 CR 306, 321);
- The supplier of a component part that was defective when it was added by the product manufacturer (see *Lee v Electric Motor Div.* (1985) 169 CA3d 375, 215 CR 195 (dictum); see generally Prosser, Strict Liability to the Consumer in California, 18 Hastings LJ 9, 28 (1966));
- The supplier of a component part designed to be used with attachments that, in use, produced injury-causing particulates (*Tellez-Cordova v Campbell-Hausfeld/Scott* (2004) 129 CA4th 577, 28 CR3d 744);
- A supplier of raw materials used by others to make finished products (*Garza v Asbestos Corp.* (2008) 161 CA4th 651, 660, 74 CR3d 359 (asbestos not substantially changed before incorporation into injury-causing product; bulk supplier defense inapplicable); *Arena v Owens-Corning Fiberglas Corp., supra* (raw asbestos); *Bay Summit Community Ass'n v Shell Oil Co.* (1996) 51 CA4th 762, 59 CR2d 322 (resin used to make plumbing pipe); *Jenkins v T & N PLC* (1996) 45 CA4th 1224, 53 CR2d 642 (asbestos fiber));
- A manufacturer that undertook to repair and modify its product (*Young v Aro Corp.* (1973) 36 CA3d 240, 111 CR 535 (death caused by disintegration of overspeeding grinder after request to repair and reduce speed));
- A builder or seller of houses (see §11.37);
- A franchisor/trademark licensor (*Kasel v Remington Arms Co., supra*); or
- Under the "representative services doctrine," an entity, other than a mere holding company, that uses a subsidiary in the state to perform services that the entity would otherwise have to perform (*Dorel Indus., Inc. v Superior Court (Jackson)* (2005) 134 CA4th 1267, 36 CR3d 742 (Canadian entity that owned Delaware corporation that owned Massachusetts manufacturer of allegedly defective child booster seat; see also §11.32).

Persons who have been held not to have been sufficiently engaged in the marketing enterprise to be subject to strict product liability include the following:

- Someone who furnishes a service rather than a product (*Ferrari v Grand Canyon Dories* (1995) 32 CA4th 248, 38 CR2d 65 (conductor of commercial raft trip not strictly liable for alleged defect in design of raft); *Pena v Sita World Travel, Inc.* (1978) 88 CA3d 642, 152 CR 17 (travel agency that arranged "package tour" on which plaintiff

injured in bus accident); *Allied Props. v John A. Blume & Assocs.* (1972) 25 CA3d 848, 855, 102 CR 259 (engineer engaged to design small-boat facility); see §§11.36-11.37);

- The maker of an item for personal use rather than for sale to the public (*Shook v Jacuzzi* (1976) 59 CA3d 978, 981, 129 CR 496);
- The designer and developer of a product who sells all interest in it to the business that manufactured the unit that caused the plaintiff's injury (*Cadlo v Owens-Illinois, Inc.* (2004) 125 CA4th 513, 23 CR3d 1);
- A product endorser (*Dekens v Underwriters Labs., Inc.* (2003) 107 CA4th 1177, 132 CR2d 699 (entity that tested appliances certified they were electrically safe, not that they contained no asbestos); *Hanberry v Hearst Corp.* (1969) 276 CA2d 680, 687, 81 CR 519 ("Good Housekeeping seal"));
- A doctor who prescribed a drug (*Carmichael v Reitz* (1971) 17 CA3d 958, 978, 95 CR 381);
- A hospital that furnished a surgical device to the operating surgeon (*San Diego Hosp. Ass'n v Superior Court (Coombe)* (1994) 30 CA4th 8, 35 CR2d 489 (laser); *Silverhart v Mount Zion Hosp.* (1971) 20 CA3d 1022, 1027, 98 CR 187 (hospital was user of surgical needle, not supplier));
- A book publisher (*Winter v G.P. Putnam's Sons* (9th Cir 1991) 938 F2d 1033, 1034 (readers of book on mushrooms became ill after eating fungi described as edible));
- A parent corporation that supplied silicone toxicology research information to the manufacturer of breast implants (*Artiglio v Corning Inc.* (1998) 18 C4th 604, 612, 76 CR2d 479 (liability under Restatement (Second) of Torts §324A (1965) not established));
- A supplier of a nondefective substance or chemical ingredient who had no control over how it was used in compounding the ultimate product (*Artiglio v General Elec. Co.* (1998) 61 CA4th 830, 71 CR2d 817 (supplier of bulk silicone to manufacturer of breast implants); *Walker v Stauffer Chem. Corp.* (1971) 19 CA3d 669, 674, 96 CR 803);
- The supplier of a nondefective component placed in a product by a manufacturer or an assembler (*Lee v Electric Motor Div., supra* (electric motor put in meat-grinding machine); *Wiler v Firestone Tire & Rubber Co.* (1979) 95 CA3d 621, 629, 157 CR 248 (tire manufacturer after automobile maker added defective valve stem); see *Fierro v International Harvester Co.* (1982) 127 CA3d 862, 868, 179 CR 923 (truck fabricator, not chassis manufacturer, liable for design deficiency that exposed fuel tanks to rupture and fire));
- A manufacturer of a nondefective product used in conjunction with other suppliers' asbestos-emitting products (*Taylor v Elliott Turbomachinery Co.* (2009) 171 CA4th 564, 90 CR3d 414);
- A component installer who, as an independent contractor, merely installed the component (*Endicott v Nissan Motor Corp.* (1977) 73 CA3d 917, 930, 141 CR 95);
- A first owner, one-time seller of a machine to a used machine dealer on closure of the initial owner's operations (*Ortiz v HPM Corp.* (1991) 234 CA3d 178, 285 CR 728 (employee of ultimate purchaser of machine injured; first owner not in business of selling such machines));
- An entity that merely purchased the manufacturer's assets (see §11.31);
- Dealers in second-hand items and auctioneers (see §§11.33-11.34);
- A furnisher of blood to a patient (see §11.36);
- A house seller's broker sued for failing to disclose the existence of microbial contamination (toxic mold that caused child's asthma) (*Coldwell Banker Residential Brokerage Co. v Superior Court (Salazar)* (2004) 117 CA4th 158, 11 CR3d 564);
- Certain architects, engineers, and others contributing to the creation of residential property (see §11.37); and
- A soils engineering firm that in no way participated in the sale of defective houses (*Swett v Gribaldo, Jones & Assocs.* (1974) 40 CA3d 573, 115 CR 99; see *Del Mar Beach Club Owners Ass'n v Imperial Contracting Co.* (1981) 123 CA3d 898, 914, 176 CR 886) (soils and structural engineers and architects)).

On strict product liability in particular situations, see §§2.10 (airplanes), 7.6 (electricity).

See Annos, 1 ALR5th 431 (1992) (liability of endorser, trade association, or other that expresses approval of product), 28 ALR4th 317 (1984) (liability of agency merely financing sale or lease-purchase), 99 ALR3d 671 (1980) (defining when persons are "engaged in business").

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§11.30 2. Lessors and Bailors

Persons who furnish products for temporary use by the public may also be subject to strict product liability. See, *e.g., Price v Shell Oil Co.* (1970) 2 C3d 245, 252, 85 CR 178 (lessor of truck); *McClaflin v Bayshore Equip. Rental Co.* (1969) 274 CA2d 446, 452, 79 CR 337, 340 (bailor of stepladder). See also *Garcia v Halsett* (1970) 3 CA3d 319, 325, 82 CR 420 (launderette owner as licensor of washing machine); *Fakhoury v Magner* (1972) 25 CA3d 58, 63, 101 CR 473 (lessor of apartment containing defective furniture).

A "finance lessor," on the other hand, whose only role was to provide money for the purchase of a machine that was to be sold to a business has been held not to have played a sufficient role in its distribution or to have done anything that would subject it to strict product liability or liability for negligence or breach of warranty. *Arriaga v CitiCapital Commercial Corp.* (2008) 167 CA4th 1527, 85 CR3d 143.

Similarly, landlords who furnish rental property are not ordinarily strictly liable in tort for defects in fixtures. See §10.31.

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§11.31 3. Successors in Interest

An entity that takes over another entity's product line or business may be subject to strict product liability for injuries caused by defects in products marketed by the predecessor. *Ray v Alad Corp.* (1977) 19 C3d 22, 136 CR 574 (liability not necessarily limited by absence of traditional successor liability criteria); *Fisher v Allis-Chalmers Corp. Prod. Liab. Trust* (2002) 95 CA4th 1182, 1188, 116 CR2d 310 (successor agreed to assume tort liabilities; court lists five exceptions to general rule of successor nonliability including "product line successor" rule stated in *Ray v Alad Corp.*). Strict liability is properly imposed on a successor company if (1) the succession has virtually destroyed the possibility of recovery from the original manufacturer, (2) the successor is able to assume the predecessor's risk-spreading role, and (3) circumstances such as the successor's enjoyment of good will of the predecessor show it to be fair to make the successor liable for injury caused by products sold before the succession. *Rosales v Thermex-Thermatron, Inc.* (1998) 67 CA4th 187, 194, 78 CR2d 861. See *Petrini v Mohasco Corp.* (1998) 61 CA4th 1091, 71 CR2d 910 (successor acquired stock of and eventually merged with supplier of asbestos products); *Rawlings v D.M. Oliver, Inc.* (1979) 97 CA3d 890, 898, 159 CR 119 (buyer of going business, including goodwill, who carried on same business in same location under same business name, liable for injury that occurred 3 months before business purchased; successor could have protected himself by risk-in-purchase agreement and can still cross-complain against predecessor for indemnity). See also *Marks v Minnesota Mining & Mfg. Co.* (1986) 187 CA3d 1429, 232 CR 594 (successor in de facto merger assumes prior corporation's punitive damage liability); *Kaminski v Western MacArthur Co.* (1985) 175 CA3d 445, 220 CR 895 (asbestos liability imposed on distributor that took over predecessor's business).

NOTE: Succeeding to the liability of a predecessor company does not necessarily include succeeding to insurance coverage available to the predecessor. See *Henkel Corp. v Hartford Acc. & Indem. Co.* (2003) 29 C4th 934, 129 CR2d 828. See also *General Acc. Ins. Co. v Superior Court* (1997) 55 CA4th 1444, 64 CR2d 781, dealing with the aftermath of *Kaminski v Western MacArthur Co., supra.*

On the other hand, the buyer of all the capital stock of a business that does not take over the business or its plant and equipment but continues to let the business operate as a separate, wholly owned subsidiary, is not liable for defective products sold before the acquisition. *Potlatch Corp. v Superior Court* (1984) 154 CA3d 1144, 1147, 201 CR 750. See *Stewart v Telex Communications, Inc.* (1991) 1 CA4th 190, 195, 1 CR2d 669 (defendant had purchased predecessor's assets from trustee in bankruptcy). See also *Chaknova v Wilbur-Ellis Co.* (1999) 69 CA4th 962, 81 CR2d 871 (successor that assumed limited financial liabilities by agreement not liable; predecessor continued in business and was sold to unrelated entity 31 years before suit filed); *Phillips v Cooper Labs.* (1989) 215 CA3d 1648, 264 CR 311 (successor not liable when predecessor continued as viable business entity for 10 years after successor corporation acquired all its stock); *Lundell v Sidney Mach. Tool Co.* (1987) 190 CA3d 1546, 236 CR 70 (successor purchased some assets from lathe manufacturer in order to operate business supplying lathe replacement parts and used predecessor's name, but nature and size of new business differed significantly; worker injured by lathe made 10 years earlier).

The terms of the agreement for the transfer of assets and liabilities are a factor in determining the successor's liability. *Franklin v USX Corp.* (2001) 87 CA4th 615, 105 CR2d 11 (purchase agreement specified that successor did not assume contingent tort liability). See *SCM Corp. v Berkel, Inc.* (1977) 73 CA3d 49, 140 CR 559 (agreement for sale of product line required successor to defend suits against predecessor's product).

A successor company may also succeed to defenses available to the predecessor. See *Burroughs v Precision Airmotive Corp.* (2000) 78 CA4th 681, 93 CR2d 124 (immunity under General Aviation Revitalization Act of 1994 (GARA) statute of repose (see §2.10) extends to airplane parts manufacturer's corporate successor).

See Annos, 18 ALR6th 629 (2006) (successor liability under "product line" theory), 112 ALR5th 113 (2003) (successor's liability under implied agreement to assume liability when transfer was fraudulent, in bad faith, or without consideration), 109 ALR5th 301 (2003) (successor's liability based on merger or consolidation), 92 ALR5th 227 (2001) (successor's duty to warn of defects in predecessor's product), 32 ALR4th 196 (1984) (effect of form of business organization on successor liability), 66 ALR3d 824 (1975) (liability of successor corporations).

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§11.32 4. Out-of-State Suppliers

A California lawsuit may be brought against the nonresident manufacturer of a product that causes injury in California when (1) the sale to a California user was not an isolated occurrence but an effort to serve the California market and (2) the defendant's convenience of having the case tried in its home state was outweighed by the convenience to plaintiff of trying the case in California. *Secrest Mach. Corp. v Superior Court* (1983) 33 C3d 664, 190 CR 175 (steel-cutting machine made in Virginia); *Bridgestone Corp. v Superior Court* (2002) 99 CA4th 767, 121 CR2d 673 (foreign tire manufacturer purposefully availed itself of the benefits of selling products to a California distributor for resale here). See *Rowe v Dorrough* (1984) 150 CA3d 901, 198 CR 131 (court took judicial notice that many of defendant's motorcycles are sold in California). See also *Dorel Indus., Inc. v Superior Court (Jackson)* (2005) 134 CA4th 1267, 36 CR3d 742 (California court had jurisdiction over Canadian entity that owned Delaware corporation that owned Massachusetts manufacturer of allegedly defective child booster seat; see also §11.29); *Sanders v CEG Corp.* (1979) 95 CA3d 779, 157 CR 252 (California court could exercise jurisdiction over foreign corporation that was successor to corporation that made allegedly defective product that injured California plaintiff). But see *Shisler v Sanfer Sports Cars, Inc.* (2006) 146 CA4th 1254, 53 CR3d 335 (no personal jurisdiction over out-of-state seller of vehicle purchased through "Web site" ad); *F. Hoffman-La Roche, Ltd. v Superior Court (Wertheimer)* (2005) 130 CA4th 782, 30 CR3d 407 (due process prevented in personam jurisdiction over Swiss holding company and Swiss raw material supplier to suable U.S. companies); *Carretti v Italpast* (2002) 101 CA4th 1236, 125 CR2d 126 (U.S. distributor of pasta machine, sued for injury to California restaurant worker, could not obtain indemnity from Italian manufacturer in California court). On service of an out-of-state product distributor by mail, see *Cruz v Fagor Am., Inc.* (2007) 146 CA4th 488, 52 CR3d 862 (pressure cooker bought at county fair in California).

Service of process on a foreign manufacturer can be accomplished by serving the company's American subsidiary. *Yamaha Motor Co. v Superior Court (Connors)* (2009) 174 CA4th 264, 94 CR3d 494.

A tribal court is without jurisdiction to hear a product liability claim against the out-of-state manufacturer of an allegedly defective vehicle. *Ford Motor Co. v Todecheene* (9th Cir 2005) 394 F3d 1170.

Forum non conveniens principles may prevent citizens of a country that does not recognize strict product liability from suing California businesses here. See *Stangvik v Shiley Inc.* (1991) 54 C3d 744, 763, 1 CR2d 556. But see *Roulier v Cannondale* (2002) 101 CA4th 1180, 124 CR2d 877 (Swiss citizen who bought and was injured on bicycle in California not barred by forum non conveniens from suing Connecticut manufacturer in California); *Holmes v Syntex Labs.* (1984) 156 CA3d 372, 202 CR 773 (partially disapproved in *Stangvik v Shiley, supra*). See also *Campbell v Parker-Hannifin Corp.* (1999) 69 CA4th 1534, 82 CR2d 202 (California courts may abate suit against aircraft component manufacturers brought by foreign plaintiffs); *Hansen v Owens-Corning Fiberglas Corp.* (1996) 51 CA4th 753, 59 CR2d 229 (California suit stayed pending determination that defendants could be sued in Montana).

For discussion of jurisdiction over nonresidents and application of the forum non conveniens doctrine, see California Civil Procedure Before Trial, chaps 6, 21 (4th ed Cal CEB 2004).

See Annos, 76 ALR4th 22 (1990) (forum non conveniens in product liability cases), 69 ALR4th 14 (1989) (jurisdiction over nonresident manufacturer of component).

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§11.33 5. Dealers in Used Goods

Strict product liability does not apply to a dealer in used goods who does not inspect, repair, or modify machines before reselling them, although liability for negligence or breach of warranty can be imposed in appropriate cases. *LaRosa v Superior Court* (1981) 122 CA3d 741, 176 CR 224 (dealer arranged shipment of defective punch press directly from prior owner to injured worker's employer; policy factors discussed). See *Tauber-Arons Auctioneers Co. v Superior Court* (1980) 101 CA3d 268, 284, 161 CR 789 (dictum: secondhand dealers and sellers of used products should not be held liable for defects created by original manufacturer, at least without proof that defect resulted from postmanufacture modification, dilapidation, or misuse).

Even if a used-goods dealer had the facilities to inspect, repair, or modify, the dealer who does not do so is not strictly liable. *Wilkinson v Hicks* (1981) 126 CA3d 515, 179 CR 5 (safety device on 50-year-old punch press had apparently been removed by prior owner).

Liability can be imposed on a seller that made extensive modifications in secondhand machinery before selling it. See *Green v City of Los Angeles* (1974) 40 CA3d 819, 838, 115 CR 685, 697 (seller was "tantamount to a manufacturer").

See Annos, 47 ALR5th 677 (1997) (implied warranties in sale of used motor vehicle), 9 ALR5th 1 (1993) (applying strict liability to sellers of used products).

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§11.34 6. Auctioneers

Strict product liability is not imposed on an auctioneer who did not take title to the product, did not modify, alter, inspect, test, or operate it, and sold it "as is," as a used machine that could be inspected by potential buyers. *Tauber-Arons Auctioneers Co. v Superior Court* (1980) 101 CA3d 268, 161 CR 789 (reversing trial court order that auctioneer was "a commercial marketer participating as an integral part of the business enterprise of marketing" a planing machine). See *Brejcha v Wilson Mach.* (1984) 160 CA3d 630, 639, 206 CR 688, 694 (no strict, negligence, or warranty liability for auctioneer who sold machinery "as is, where is" (*i.e.,* without inspection) and "without warranty of merchantability [or] fitness for particular use").

See Anno, 83 ALR4th 1188 (1991) (strict liability of auctioneers).

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§11.35 E. Product Types

Strict product liability applies to a broad variety of products, including automobiles, tires and other components, airplanes, household furniture and appliances, bottles, tools, factory machines, food, drugs, vaccines, and houses. See *Greenman v Yuba Power Prods., Inc.* (1963) 59 C2d 57, 62, 27 CR 697, 700 (listing of products). See generally Restatement (Second) of Torts §402A, Comment d (1965); Prosser, *Strict Liability to the Consumer in California*, 18 Hastings LJ 9, 21 (1966).

For cases on particular products, see Annos, 23 ALR6th 143 (2007) (cardiac pacemakers), 16 ALR6th 143 (2006) (beryllium), 4 ALR6th 4223 (2005) (mechanical or chain saws), 3 ALR6th 355 (2005) (home and office furnishings), 122 ALR5th 515 (2004) (household equipment for food handling), 117 ALR5th 267 (2004) (elevators, hoists, and their components), 115 ALR5th 1 (2004) (automatic passenger elevators: liability of maintainer, repairer, or installer), 93 ALR5th 103 (2001) (products other than tobacco; liability based on advertising), 81 ALR5th 245 (2000) (ladders), 72 ALR5th 299 (1999) (helicopters), 69 ALR5th 137 (1999) (paints and similar products), 65 ALR5th 357 (1999) (drug, medical instrument of similar device), 65 ALR5th 105 (1999) (swimming pools and accessories), 61 ALR5th 737 (1998) (mobilehome or trailer), 60 ALR5th 413 (1998) (cement and concrete), 59 ALR5th 461 (1998) (computer hardware and software), 54 ALR5th 1 (1997) (contraceptives), 39 ALR5th 267 (motor vehicle air bag systems), 36 ALR5th 541 (1996) (cigarettes and other tobacco products).

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§11.36 1. Blood and Biological Products

Furnishing blood to a patient in a hospital is a service, not a sale; strict liability and warranty principles do not apply in actions for injury from contaminated blood whether the defendant is a hospital, a clinic, the supplier of blood, or the manufacturer of a blood product. Health & S C §1606; *Hyland Therapeutics v Superior Court* (1985) 175 CA3d 509, 220 CR 590 (blood supplier); *Fogo v Cutter Labs.* (1977) 68 CA3d 744, 750, 137 CR 417 (manufacturer of plasma-derived coagulant that contained hepatitis virus); *McDonald v Sacramento Med. Found. Blood Bank* (1976) 62 CA3d 866, 133 CR 444; *Shepard v Alexian Bros. Hosp.* (1973) 33 CA3d 606, 109 CR 132 (hepatitis contracted after transfusion).

Similarly, a tissue bank that supplies human tissue to replace a patient's own tissue is the supplier of a service, not of a product. See *Cryolife, Inc. v Superior Court (Minvielle)* (2003) 110 CA4th 1145, 2 CR3d 396 (further, tissue bank is health care provider from which punitive damages are recoverable only by plaintiff who has followed procedures required by CCP §425.13 and described in §9.29).

On a blood supplier's liability for negligence, see §§9.55 (blood bank operators), 11.53 (suppliers' duty to inspect and warn). See §11.73 on liability for misrepresentation, including allegedly falsely telling patient or patient's family that direct donation would not be possible.

See Annos, 75 ALR5th 229 (2000) (blood shield statutes), 64 ALR5th 333 (1998) (liability to person who contracted AIDS from blood transfusion).

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§11.37 2. Houses and Lots

The purchaser of a house or residential lot can sue a mass producer, seller, developer, contractor, or engineer on strict liability grounds for damage resulting from design and construction defects. See §6.14.

Property damage claims against contractors and others for defects in residences sold on or after January 1, 2003, are, with specified exceptions, subject to detailed restrictions and procedural requirements set out in CC §§895-945.5. See generally §§6.13-6.15. The new provisions appear to negate the holding in *Aas v Superior Court* (2000) 24 C4th 627, 639, 101 CR2d 718, that damages are not recoverable for construction defects that had not yet damaged houses but had diminished their value, and the following cases should be reevaluated in the light of CC §§895-945.5. See also *Carrau v Marvin Lumber & Cedar Co.* (2001) 93 CA4th 281, 292, 112 CR2d 869 (defective windows diminished value of house); *Zamora v Shell Oil Co.* (1997) 55 CA4th 204, 63 CR2d 762 (jury finding that polybutylene plumbing pipes had leaked in 20 houses did not justify damages recoveries by owners of 14 houses in which pipes of same type had not yet leaked; need to show appreciable present harm, not merely threat of future harm).

Not subject to strict product liability are architects, engineers, and others who were involved in developing the property but not in its final configuration or sale. See, *e.g., Del Mar Beach Club Owners Ass'n v Imperial Contracting Co.* (1981) 123 CA3d 898, 914, 176 CR 886 (soils and structural engineers and architects provided service, not product; could be sued for negligence or intentional tort, not strict product liability); *Swett v Gribaldo, Jones & Assocs.* (1974) 40 CA3d 573, 115 CR 99 (soils engineers).

See Annos, 4 ALR5th 667 (1992) (prefabricated buildings), 25 ALR4th 351 (1983) (strict liability for defects in building or land).

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§11.38 3. Prepared Foods

Strict product liability may be imposed on the server of prepared food only if it contains a "foreign substance," not if the item that caused the injury was natural to the particular dish. See *Mexicali Rose v Superior Court* (1992) 1 C4th 617, 4 CR2d 145 (no strict liability for injury caused by one-inch chicken bone in a chicken enchilada, although possible negligence liability if restaurant failed to use reasonable care in preparing the item); *Ford v Miller Meat Co.* (1994) 28 CA4th 1196, 33 CR2d 899. See also discussion in §11.14 of *Livingston v Marie Callenders, Inc.* (1999) 72 CA4th 830, 85 CR2d 528 (adverse allergic reaction to MSG in soup). On negligence liability, see §11.48.

See Annos, 2 ALR5th 189 (1992) (injury from object related to, but not intended to be in, food product), 1 ALR5th 1 (1992) (foreign object in food), 90 ALR4th 12 (1991) (foreign object in beverage).

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§11.39 4. Tobacco

A cigarette manufacturer can be liable for a design defect under both the failure to meet consumer-expectations theory (see §11.9) and the risk/benefit test (see §11.10), as well as for a failure to warn of known dangers (see §§11.14-11.18). See *Bullock v Phillip Morris USA, Inc.* (2008) 159 CA4th 655, 674, 71 CR3d 775 (liability judgment affirmed; remanded for new trial on punitive damages).

A plaintiff seeking damages for physical injury from smoking cigarettes may sue within a limitations period based on manifestation of injury, rather than actual or constructive awareness of the harmful effects of smoking. *Grisham v Phillip Morris U.S.A., Inc.* (2007) 40 C4th 623, 629, 54 CR3d 735. In a damages action for economic loss alleged to have resulted from addiction to cigarettes, on the other hand, the plaintiff who began smoking, and became addicted, years earlier must plead facts showing the reasons for not having initiated suit within the limitations period. For either personal injury or economic loss, there is no special presumption that the plaintiff should have known by 1988 that smoking would cause addiction and other health problems. *Grisham* rejects the theory, based on *Soliman v Philip Morris, Inc.* (9th Cir 2002) 311 F3d 966, that the statute of limitations began to run as soon as the plaintiff discovered that he or she was addicted. 40 C4th at 629.

NOTE: The California Supreme Court has granted the request from the Ninth Circuit Court of Appeals to examine the question "When multiple distinct personal injuries allegedly arise from smoking tobacco, does the earliest injury trigger the statute of limitations for all claims, including those based on a later injury?" *Pooshs v Phillip Morris USA, Inc.* (request granted May 20, 2009, S172023; court of appeals request at (9th Cir 2009) 561 F3d 964). See generally Smith, *Separate Injuries Trigger Separate Limitation Periods,* 37 CAOC Forum No. 5, p 22 (Consumer Attorneys of California), July/Aug. 2007.

The Federal Cigarette Labeling and Advertising Act of 1965 (15 USC §§1331-1340), as amended by the Public Health Cigarette Smoking Act of 1969, preempts certain state law product liability claims against tobacco suppliers, but not others. Preempted, for example, are failure to warn and fraudulent misrepresentation claims based on allegations that post-1969 advertising or promotional materials should have included additional or more clearly stated warnings. *Cipollone v Liggett Group, Inc.* (1992) 505 US 504, 514, 120 L Ed 2d 407, 112 S Ct 2608. Not preempted are, for example, (1) failure to warn claims based solely on negligent testing, research practices, or other actions unrelated to advertising or promotion, (2) fraudulent concealment claims based on a state law duty to disclose material facts through a state agency or other channel other than advertising or promotion, (3) misrepresentation claims based on false statements in advertising, and (4) assuming proof of misrepresentation, conspiracy to misrepresent material facts. See *Altria Group, Inc. v Good* (2008) ___ US ___, 172 L Ed 2d 398, 129 S Ct 538 (no preemption of claim that advertising cigarettes as "light" and "lowered tar and nicotine" violated Maine's unfair trade practices act); *Rivera v Phillip Morris, Inc.* (9th Cir 2005) 395 F3d 1142, 1147 (plaintiff permitted to proceed on claims for strict liability failure to warn, but not, although they were not preempted, on claims for fraudulent concealment or misrepresentation).

Beginning on January 1, 1998, CC §1714.45 (see §11.46) no longer exempts tobacco product manufacturers and their successors in interest from product liability, although the code section continues to exempt retailers, distributors, and certain others. This change in CC §1714.45 appears to nullify the rulings (that a fault percentage is not to be assigned to tobacco manufacturers for Proposition 51 (CC §1431.2; see §1.69) purposes) in *Rutherford v Owens-Illinois, Inc.* (1997) 16 C4th 953, 67 CR2d 16, and *Richards v Owens Illinois, Inc.* (1997) 14 C4th 985, 60 CR2d 103. The amendment did not, however, abrogate or extend the limitations period (see §11.41) for filing a product liability lawsuit for injury caused by tobacco. *Barker v Brown & Williamson Tobacco Corp.* (2001) 88 CA4th 42, 105 CR2d 531.

Suppliers of tobacco products can be held strictly liable for conduct occurring outside of the period from 1988 through 1997 during which the "immunity" version of CC §1714.45 was in effect. *Myers v Philip Morris Cos., Inc.* (2002) 28 C4th 828, 832, 123 CR2d 40; *Boeken v Philip Morris, Inc.* (2005) 127 CA4th 1640, 26 CR3d 638 (verdict for plaintiff upheld on theories of defective design, failure to warn, prior to 1969, intentional misrepresentation, fraudulent concealment, false promise, and negligent misrepresentation; $3 billion punitive damages award reduced to $50 million). Tobacco products suppliers can also be liable for conduct during the 10-year 1988-1997 period that involved adding substances that exposed smokers to dangers beyond those commonly known to be associated with smoking. *Naegle v R.J. Reynolds Tobacco Co.* (2002) 28 C4th 856, 867, 123 CR2d 61 (apparently leaving open the possibility of liability for injury from manufacturing defects, breach of warranty, and fraud that allege more than personal injury caused by risk inherent in tobacco use). See *Whiteley v Philip Morris, Inc.* (2004) 117 CA4th 635, 11 CR3d 807 (evidence that additives were partial cause of injury from smoking cigarettes avoided CC §1714.45 bar; claim that cigarette companies

intentionally misrepresented health effects of smoking not preempted by Federal Cigarette Labeling and Advertising Act (15 USC §§1331-1340); no substantial evidence supported finding that negligent design of cigarettes was, in reasonable medical probability, substantial factor contributing to lung cancer).

Cases discussing the constitutionality or excessiveness of punitive damages awarded for injury or death from tobacco use are covered in California Tort Damages §§14.11-14.12 (2d ed Cal CEB 2002). See Anno, 108 ALR5th 343 (2003) (cigarette manufacturers' liability for punitive damages).

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§11.40 F. Indemnity Among Suppliers

Strict product liability encompasses defects regardless of their source; thus, a plaintiff may recover from any person or entity that was an integral part of the overall producing and marketing enterprise, regardless of which one of them created the defect that caused plaintiff's loss. *Vandermark v Ford Motor Co.* (1964) 61 C2d 256, 261, 37 CR 896, 899. See *Alvarez v Felker Mfg. Co.* (1964) 230 CA2d 987, 1006, 41 CR 514, 520 (distributor of industrial equipment). See *Gherna v Ford Motor Co.* (1966) 246 CA2d 639, 651, 55 CR 94, 101 (Ford label affixed to another's product).

Although any one or more of the persons in the marketing chain may be sued by a plaintiff for injuries caused by a defective product, persons who are not themselves at fault for creating the defect or for causing the injury are entitled to obtain indemnity from the persons in the chain who are ultimately responsible. See *Davis v Air Tech. Indus.* (1978) 22 C3d 1, 148 CR 419 (manufacturer indemnified retailer for plaintiff's damages but not for attorney fees to defend charge of retailer negligence; see CCP §1021.6 for legislative response). See also *Harbor City Discount Auto Ctr. v Firestone Tire & Rubber Co.* (1979) 95 CA3d 886, 157 CR 438 (car retailer, wholesaler, and manufacturer seeking indemnity from tire manufacturer not entitled to indemnification for costs of defending plaintiff's lawsuit or other defendant's cross-claim); *Aetna Life & Cas. Co. v Ford Motor Co.* (1975) 50 CA3d 49, 122 CR 852 (lessee who paid damages caused by brake failure could sue car manufacturer); *Bill Loeper Ford v Hites* (1975) 47 CA3d 828, 121 CR 131 (retailer not entitled to indemnity from driver/purchaser); *Southern Pac. Co. v Unarco Indus.* (1974) 42 CA3d 142, 116 CR 847. See Anno, 100 ALR5th 409 (2002) (indemnity in actions by users of automatic passenger elevators).

Insofar as causative fault may be attributed to more than one of the persons in the marketing chain, there is a basis for equitable apportionment of loss among them. See *Safeway Stores, Inc. v Nest-Kart* (1978) 21 C3d 322, 146 CR 550 (apportionment between strictly liable defendant and negligent defendant). See also *Daly v General Motors Corp.* (1978) 20 C3d 725, 739, 144 CR 380, 388; *Transwestern Pipeline Co. v Monsanto Co.* (1996) 46 CA4th 502, 523, 53 CR2d 887 (pipeline company sued by gas company for supplying contaminated gas entitled to indemnity from manufacturer of a component of the gas).

That a defect existed in a component part is not a defense to the manufacturer's strict liability. *Brocklesby v U.S.* (9th Cir 1985) 767 F2d 1288 (defective component was Federal Aviation Agency airport approach procedure; chart manufacturer relegated to indemnity action against United States, even though government not subject to strict liability in tort).

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G. Defenses

§11.41 1. Statute of Limitations

From January 1, 2003, an action for personal injury or wrongful death caused by a defective product is subject to the 2-year limitations period specified in CCP §335.1. (Formerly, the period was 1 year. See former CCP §340(3). See note in §2.32 on retroactivity of the new limitations period.)

From January 1, 2004, an action for injury or illness based on exposure to a hazardous material or toxic substance may be commenced no later than 2 years from the later of either (1) the date of injury or (2) the date the plaintiff became (or should have become) aware of (a) an injury, (b) its physical cause, and (c) sufficient facts to put a reasonable person on inquiry notice that the injury was caused or contributed to by another's wrongful act. CCP §340.8(a). An action for wrongful death from such exposure must be begun no later than 2 years from the later of either (1) the date of death or (2) the first date the plaintiff became (or 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's wrongful act. CCP §340.8(b). The provisions do not apply to actions for injury or death from asbestos (see CCP §340.2 below) or the professional negligence of a health care provider (see CCP §340.5, discussed in §§9.67-9.72) and media reports alone are not deemed to put a reasonable person on inquiry notice. CCP §340.8(c). See *Nelson v Indevus Pharm., Inc.* (2006) 142 CA4th 1202, 48 CR3d 668 (statute did not begin to run when dangers of weight-loss drug were publicized but later, after plaintiff saw attorney's ad and had echocardiogram). When passing CCP §340.8, the legislature stated an intent to codify the rulings in *Jolly v Eli Lilly & Co.* (1988) 44 C3d 1103, 1110, 245 CR 658 (under delayed discovery rule, period begins to run when plaintiff is aware of injury and its negligent cause); *Norgart v Upjohn Co.* (1999) 21 C4th 383, 404, 87 CR2d 453 (cause of action for death from allegedly defective drug (Halcion) accrued at date of death or within year thereafter when heirs had formed belief that someone or something had done something to decedent that caused her to overdose; had they then filed complaint against those they suspected—decedent's husband and psychiatrist—they could later have substituted drug company for fictitiously named defendant); and *Clark v Baxter Healthcare Corp.* (2000) 83 CA4th 1048, 1057, 100 CR2d 223 (limitations period begins to run when plaintiff knows of injury and its factual (or physical) cause *and* sufficient facts to be on inquiry notice of its tortious cause; nurse who knew she was allergic to latex gloves only later read that allergy could be due to manufacturing defect).

NOTE: For other rulings made before the enactment of CCP §340.8, see *Tucker v Baxter Healthcare Corp.* (9th Cir 1998) 158 F3d 1046 (statute began to run when plaintiff suspected or should have suspected that autoimmune disease was caused by malfunctioning breast implants, not earlier when other problems related to implants were experienced); *Bennett v Suncloud* (1997) 56 CA4th 91, 97, 65 CR2d 80 (basic period applies to product liability, negligence, and breach of warranty causes of action); *Becker v Volkswagen of Am., Inc.* (1975) 52 CA3d 794, 125 CR 326 (breach of warranty; see §11.72). See also *Becker v McMullin Constr. Co.* (1991) 226 CA3d 1493, 277 CR 491 (application of *Jolly* to property damage mass-tort claim); *Sevilla v Stearns-Roger, Inc.* (1980) 101 CA3d 608, 161 CR 700 (that defective product was machine installed in factory does not extend basic period to longer period applicable to real property improvements; see discussion in §§6.18-6.20).

A special statute of limitations, CCP §340.2, applies to injury resulting from exposure to asbestos. For discussion of the numerous cases decided under §340.2, see California Workers' Damages Practice §3.25 (2d ed Cal CEB 2001).

NOTE: California residents, despite suing here, may be subject to the shorter limitations period of the state where they were resident when the injury-causing acts occurred. See *Cossman v Daimler Chrysler Corp.* (2003) 108 CA4th 370, 133 CR2d 376 (2-year Indiana statute was defense to claim that worker's wife was exposed to asbestos when she washed his clothes).

Under the delayed discovery rule, a cause of action for injury from a defective product accrues (and the statute of limitations begins to run) when the plaintiff has reason to suspect an injury and some wrongful cause, unless the plaintiff pleads and proves that a reasonable investigation at that time would not have revealed that a product defect was a possible cause in which case the limitations period is tolled until a reasonable investigation would have revealed a factual basis for suing the product supplier. *Fox v Ethicon Endo-Surgery* (2005) 35 C4th 797, 803, 27 CR3d 661 (plaintiff first learned during discovery in a medical malpractice suit that a product used during her surgery may have been defective). Further, a cause of action accrues when a defect in a product causes injury, not when the product was made or sold. See *Balido v Improved Mach., Inc.* (1972) 29 CA3d 633, 105 CR 890 (manufacturer that sold defective

machine 15 years earlier could be liable for injury to user even though manufacturer had meanwhile sent warnings about defect to plaintiff's employer—a subsequent owner of the machine). See also *San Francisco Unified Sch. Dist. v W.R. Grace & Co.* (1995) 37 CA4th 1318, 44 CR2d 305 (statute of limitation began to run, not when district discovered that asbestos had been used in its buildings, but when actual asbestos contamination occurred). On limits that may apply when a medical product causes injury, see §§9.71-9.76. The date of accrual may be indicated by the date that the injured person filed a workers' compensation claim for the same injury. See *Rivas v Safety-Kleen Corp.* (2002) 98 CA4th 218, 226, 119 CR2d 503, and discussion in California Workers' Damages Practice §3.24 (2d ed Cal CEB 2001).

When the pathological effects of a drug occur without perceptible trauma, the statute of limitations does not begin to run until the injured person knows or, through reasonable diligence, should have discovered the cause of injury. *G.D. Searle & Co. v Superior Court* (1975) 49 CA3d 22, 25, 122 CR 218 (plaintiff must, however, plead time and manner of discovery and circumstances excusing late discovery). See *New v Armour Pharm. Co.* (9th Cir 1995) 67 F3d 716 (in suit against manufacturer of blood coagulant by patient claiming that product gave him AIDS, time began to run when he first discovered a decline in health, not when he first tested HIV-positive); *Martinez-Ferrer v Richardson-Merrell, Inc.* (1980) 105 CA3d 316, 164 CR 591 (cause of action for injury from cataracts caused by taking drug MER/29 accrued in 1976 when cataracts were discovered and cause diagnosed, not in 1960 when plaintiff took drug and suffered temporarily blurred vision). See also *Pereira v Dow Chem. Co.* (1982) 129 CA3d 865, 873, 181 CR 364 (skin rash from chemical spill did not start statute running on cause of action for kidney dysfunction from chronic exposure to solvent). See §1.69 on the accrual, for Proposition 51 (CC §1431.2) purposes, of causes of action for asbestos-related diseases and other progressive injuries.

Allegations that the manufacturer knew of a defect, but concealed it from the plaintiffs, show fraudulent concealment that would toll the statute of limitations until plaintiffs learned of the defect and its connection to the injury. *Baker v Beech Aircraft Corp.* (1974) 39 CA3d 315, 114 CR 171 (allegations that manufacturer knew or should have known that fuel system did not meet minimum federal standards and that its failure caused crash).

A drug manufacturer can block a minor's prenatal injury lawsuit filed more than 6 years after birth; the manufacturer is not a "health care provider" who may be sued under CCP §340.5 until the minor reaches age 8. *Dillashaw v Ayerst Labs.* (1983) 141 CA3d 35, 190 CR 68 (applying 6-year limit of former CC §29, since replaced by CCP §340.4). On the possibility of avoiding this limitation, see §9.75.

A plaintiff who meets the requirements of CCP §474 may substitute the name of a product supplier for a defendant sued under a fictitious name. See *General Motors Corp. v Superior Court* (1996) 48 CA4th 580, 55 CR2d 871 (seat belt manufacturer; plaintiff belatedly learned basic facts needed to plead product liability claim). On such substitutions, see California Civil Procedure Before Trial §16.14 (4th ed Cal CEB 2004).

On the 18-year statute of repose in the General Aviation Revitalization Act of 1994 (GARA) (49 USC §40101) for suits based on defects in general aviation aircraft, see §2.10.

See Annos, 30 ALR5th 1 (1995) (statutes barring suit at fixed period after manufacture, sale, or delivery of product), 91 ALR3d 991 (1979) (effect of plaintiff's lack of knowledge of defect).

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§11.42 2. Contributory Fault; Misuse of Product

Comparative fault principles (see §1.41) apply to strict product liability lawsuits; a plaintiff's recovery is reduced to the extent that his own misuse of the product or other lack of reasonable care contributed to his injury; a product supplier need not bear the share of the plaintiff's damages that flows from plaintiff's own fault. *Daly v General Motors Corp.* (1978) 20 C3d 725, 347, 144 CR 380 (rejecting former view that contributory negligence was not a defense to strict product liability). Similarly, a consumer's alteration of a product after acquiring it is a form of comparative fault that may reduce, but does not ordinarily bar, a damages recovery. See §11.4.

A consumer's misuse of a product does not bar recovery if the misuse was foreseeable, although misuse constitutes fault that proportionally reduces damages. See *DeLeon v Commercial Mfg. & Supply Co.* (1983) 148 CA3d 336, 344, 195 CR 867 (foreseeable that worker might stand on conveyor belt to clean large bin instead of removing front panel); *Bates v John Deere Co.* (1983) 148 CA3d 40, 49, 195 CR 637 (foreseeable that operator might try to clear obstruction from intake head of cotton-picker while motor ran; 40-percent reduction of damages for plaintiff's fault in doing so).

NOTE: On the pre-*Daly* effect of allegations of product misuse, see *Campbell v Southern Pac. Co.* (1978) 22 C3d 51, 56, 148 CR 596, 599 (unforeseeable misuse a defense only if it was sole cause of injury; defendant liable under evidence that showed both defect and misuse as causes). Proof of an unforeseeable misuse may now be viewed as negating a necessary element of the plaintiff's cause of action. See §11.3.

When a manufacturer bases a "misuse" defense on a showing that warnings against the injury-causing use accompanied the product when it was sold, the question of whether the plaintiff so misused the product as to absolve the manufacturer from liability is "inextricably interwoven" with the adequacy of the warnings. See *Schwoerer v Union Oil Co.* (1993) 14 CA4th 103, 113, 17 CR2d 227 (warning to use protective clothing to prevent skin irritation may be inadequate when liver damage from inhalation of fumes was foreseeable). Further, the manufacturer must show that the alleged misuse was the actual cause (or the only possible cause) of the injury. See *Huynh v Ingersoll-Rand* (1993) 16 CA4th 825, 833, 20 CR2d 296 (no showing that use of disk rated at 24,000 rpm on grinder rated at 30,000 rpm was reason disk "exploded"; also no showing that warning label on disk was adequate).

See Note in §11.3 on requiring the plaintiff, at a deposition, to reenact how he or she was using the product when it was alleged to have caused injury.

See Anno, 50 ALR5th 275 (1997) (liability when fumes from product used for self-intoxication), 9 ALR4th 633 (1981) (applicability of comparative negligence doctrine to strict product liability).

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§11.43 3. Assumption of Risk

Under the modern formulation of the assumption of risk defense (see §§1.43, 1.46-1.52), a consumer's use of a product known to be defective would be a "secondary" assumption of the risk, which is a form of contributory negligence that may require a comparative reduction of damages but is not a complete bar to recovery; that is, the primary assumption of risk doctrine does not insulate product suppliers from liability for injuries resulting from defects in products. *Ford v Polaris Indus.* (2006) 139 CA4th 755, 758, 43 CR3d 215 (personal watercraft that propelled high-pressure stream of water that "tore apart her internal organs"). See *Daly v General Motors Corp.* (1978) 20 C3d 725, 742, 144 CR 380; *Milwaukee Elec. Tool Corp. v Superior Court* (1993) 15 CA4th 547, 19 CR2d 24 (glazier using heavy-duty drill that had locked up was thrown off ladder); *Akers v Kelley Co.* (1985) 173 CA3d 633, 651, 219 CR 513, 524, disapproved on other grounds at 16 C4th 582 n5 (plaintiff not barred from recovery by attempting to operate broken equipment, contrary to superior's instructions, when specific malfunction that caused injury was unforeseeable, of different nature, and of greater magnitude than hazard warned against). See also *Bunch v Hoffinger Indus., Inc.* (2004) 123 CA4th 1278, 1300, 20 CR3d 780 (primary assumption of risk no bar to suit by 11-year-old injured in dive into four-foot-deep, aboveground swimming pool; also noted in §§1.50, 11.16, 11.43); *Wright v Stang Mfg. Co.* (1997) 54 CA4th 1218, 1232, 63 CR2d 422 (no primary assumption of risk by firefighter who used "deck gun" attached to fire engine although he knew that mounting might have become corroded or was not strong enough to avoid its separating from truck under foreseeable water supply conditions; see also §11.14). But see *Souza v Squaw Valley Ski Corp.* (2006) 138 CA4th 262, 41 CR3d 389 (8-year-old who skied into clearly visible snow-making hydrant was neither injured while using hydrant nor bystander to its use; injury did not result from use as product; see also §1.51).

An exculpatory agreement may insulate the owner of a product from strict product liability. See *Ontiveros v 24 Hour Fitness USA, Inc.* (2008) 169 CA4th 424, 86 CR3d 767 (in fitness center membership agreement, patron had agreed that center would not be liable for defective exercise equipment). On the other hand, certain purported exculpatory agreements do not, as a matter of public policy, insulate a supplier from strict product liability. See *Westlye v Look Sports, Inc.* (1993) 17 CA4th 1715, 1742, 22 CR2d 781 (both ski shop and distributor subject to strict product liability even though plaintiff had signed written agreement to accept product "as is"; distributor, not party to agreement, could also be liable for breach of warranty, false representation, or negligent design, manufacture, or distribution). See §1.54 on express assumption of risk and exculpatory agreements generally.

The firefighter's rule (see §1.55) would rarely be a defense to a strict product liability cause of action because the product supplier's tort would usually be independent from the firefighter's or police officer's occasion for being at the scene where he or she was injured. See *Stapper v GMI Holdings, Inc.* (1999) 73 CA4th 787, 791, 86 CR2d 688 (after arriving at fire, firefighter's injury (and another's death) resulted from being trapped when garage door opener malfunctioned).

See Anno, 93 ALR3d 1296 (1979) (effect of prospective buyer's releasing seller from liability for injury resulting from trial use or inspection of product).

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§11.44 4. Adequate Warning Given

Evidence that a supplier has attached to a product a warning against a particular use may be used defensively (1) to refute the plaintiff's showing, as an element of his cause of action, that the product was being used in a foreseeable way (see §11.3), (2) to refute a claim an absence of adequate warnings made the product defective (see §11.14), or (3) to establish that the plaintiff was contributorily negligent for using the product despite or contrary to the warning (see §11.42).

Whether a supplier's written warning was adequate for a particular defensive purpose may be a legal question determinable by the trial court, unless extrinsic evidence is needed to interpret or understand it. See *Temple v Velcro USA, Inc.* (1983) 148 CA3d 1090, 1094, 196 CR 531 (warning that Velcro fastener should not be used to secure panels of hot-air balloon was received by user; warning not attached to product, but given after sale when manufacturer recognized danger). See also *Springmeyer v Ford Motor Co.* (1998) 60 CA4th 1541, 1557, 71 CR2d 190 (adequate warning not invariably defense to strict product liability; superseding cause between successive wrongdoers can be question of law).

The maker of a bulk product that is sold to a distributor for repackaging may be immunized from liability by giving adequate warnings to that distributor (who then has the duty to warn consumers of the repackaged product). See *Groll v Shell Oil Co.* (1983) 148 CA3d 444, 196 CR 52.

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§11.45 5. Federal Statutory Immunity or Preemption

A supplier of equipment to the federal government is not subject to liability under state law for design defects if (1) the United States approved reasonably precise specifications for the allegedly defective equipment; (2) the equipment conformed to those specifications; and (3) the supplier warned the United States about the dangers in using the equipment that were known to the supplier but not to the United States. *Boyle v United Technols. Corp.* (1988) 487 US 500, 101 L Ed 2d 442, 108 S Ct 2510 (to permit imposition of state tort liability against manufacturer in these circumstances would frustrate purpose of federal governmental immunity for discretionary conduct under 28 USC §2680(a)). See *Butler v Ingalls Shipbuilding, Inc.* (9th Cir 1996) 89 F3d 582 (accommodation ladder on Navy ship was "military equipment"; defense does not apply to manufacturer's failure to warn absent evidence that it decided not to warn in compliance with reasonable specifications imposed by the United States). See also *Snell v Bell Helicopter Textron, Inc.* (9th Cir 1997) 107 F3d 744 (defense not established as matter of law). On the government contractor defense in state product liability actions, see Anno, 52 ALR5th 535 (1997).

NOTE: Although *Boyle* specifically concerned *military* equipment, the court's reasoning might apply to any product supplied by a contractor to the federal government in conformity to government-approved specifications. See *McLaughlin v Sikorsky Aircraft* (1983) 148 CA3d 203, 210, 195 CR 764, 768; *McKay v Rockwell Int'l Corp.* (9th Cir 1983) 704 F2d 444. See, however, *Nielsen v George Diamond Vogel Paint Co.* (9th Cir 1990) 892 F2d 1450 (application of *Boyle* limited to military contractors).

The manufacturer may also be effectively immune from liability in United States courts for injury caused by a product furnished to a foreign government. See *Corrie v Caterpillar, Inc.* (9th Cir 2007) 503 F3d 974 (alleged liability for death of protester run over by bulldozer, furnished by United States to Israel, presented nonjudiciable political question).

The federal Medical Device Amendments (21 USC §§360c-360k) of the federal Food, Drug, and Cosmetic Act (21 USC §§301-395) do not ordinarily preempt strict product liability claims, unless, perhaps, the state law claim "actually conflicts" with a federal requirement. See §§13.27-13.41. The Consumer Product Safety Act (CPSA) (15 USC §§2051-2084) does not preclude suit against the manufacturer of an allegedly defective glass shower door. *Leipart v Guardian Indus.* (9th Cir 2000) 234 F3d 1063.

The Communications Decency Act (CDA) (47 USC §230) immunizes an Internet web-server (such as MySpace) from liability to a person assaulted by someone met through the site. See *Julie Doe II v MySpace, Inc.* (2009) 175 CA4th 561, 96 CR3d 148.

The Protection of Lawful Commerce in Arms Act (PLCAA) (15 USC §§1709-7903) preempts claims against federally licensed manufacturers and sellers of firearms by victims shot by criminals, but not claims against unlicensed foreign manufacturers. *Ileto v. Glock, Inc.* (9th Cir 2009) 565 F3d 1126.

The Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) (7 USC §§136-136y) preempts suit for damage to a walnut crop alleging a supplier's failure to warn of the risks of using a particular pesticide. *Etcheverry v Tri-Ag Serv., Inc.* (2000) 22 C4th 316, 93 CR2d 36. But see *Bates v Dow Agrosciences LLC* (2005) 544 US 431, 161 L Ed 2d 687, 125 S Ct 1788 (FIFRA did not preempt farmers' state law claims for negligence in manufacturing and testing of pesticide or breach of warranty in labeling); *Sun Valley Packing v Consep, Inc.* (2001) 94 CA4th 315, 114 CR2d 237 (no FIFRA preemption of suit based on ineffectiveness of product that disrupts fruit fly mating); *Arnold v Dow Chem. Co.* (2001) 91 CA4th 698, 110 CR2d 722 (no FIFRA preemption of action based on defects in chemicals rather than on defective labeling).

The Federal Safety Appliance Acts (49 USC §§20301-20306) and their implementing regulations "occupy the field" regulating railroad car safety and thus preempt a state common-law tort claim for damages based on the allegedly defective design of a railroad car. *Carrillo v ACF Indus., Inc.* (1999) 20 C4th 1158, 86 CR2d 832. Similarly, the federal Locomotive Boiler Inspection Act (BIA) (49 USC §§20701-20703) preempts state law tort claims, thus precluding suit against a locomotive manufacturer alleging asbestos-related injury from defective design. *Frastaci v Vapor Corp.* (2007) 158 CA4th 1389, 70 CR3d 402 (BIA preemption precludes strict product liability); *Forrester v American Dieselelectric, Inc.* (9th Cir 2001) 255 F3d 1205 (Act preempts suit for injury from locomotive crane). See also *Monarch v Southern Pac. Transp. Co.* (1999) 70 CA4th 1197, 1208, 83 CR2d 247 (Federal Employers' Liability Act (45 USC §§51-60) preempts state claim by railroad worker for hearing loss based on allegations of fraudulent concealment).

A cause of action based on the defective design of an automobile seatbelt is not preempted by either the National Traffic and Motor Vehicle Safety Act (former 15 USC §§1381-1431) or Federal Motor Vehicle Safety Standard (FMVSS) 208 (49 CFR §571.208 (1995), amended 68 Fed Reg 504 (2003)). *Ketchum v Hyundai Motor Co*. (1996) 49 CA4th

1672, 57 CR2d 595. On the other hand, the act precludes a state court claim based on allegations that a vehicle without airbags was defective if the vehicle was in compliance with FMVSS 208. *Geier v American Honda Motor Co.* (2000) 529 US 861, 146 L Ed 2d 914, 120 S Ct 1913 (4-3 decision). See *Williamson v Mazda Motor of Am., Inc.* (2008) 167 CA4th 905, 84 CR3d 545 (FMVSS preempts action based on manufacturers' opting not to install lap/shoulder restraint at inboard seating position); *Harris v Ford Motor Co.* (9th Cir 1997) 110 F3d 1410, in which a divided panel ruled that a claim that a car was defectively designed because it failed to provide a driver's side airbag was expressly preempted by the act. But see *Kent v DaimlerChrysler Corp.* (ND Cal 2002) 200 F Supp 2d 1208 (property damage claim alleging risk from cars' propensity to self-shift from park to reverse not preempted by Federal Motor Vehicle Safety Act (49 USC §§30101-30170). A preemption defense must be asserted in the trial court, not for the first time on appeal. *Karlsson v Ford Motor Co.* (2006) 140 CA4th 1202, 1236, 45 CR3d 265 (whether Federal Motor Vehicle Safety Act preempts is issue of choice of law, not jurisdiction).

NOTE: The court in *Ketchum* declined to follow *Nissan Motor Corp. v Superior Court* (1989) 212 CA3d 980, 982, 261 CR 80, in which a claim based on the absence of an airbag was held to be preempted.

The federal maritime wrongful death cause of action recognized in *Moragne v States Marine Lines, Inc.* (1970) 398 US 375, 26 L Ed 2d 339, 90 S Ct 1772, does not prevent an injured person from suing under state strict product liability law for injury caused by a defective jet ski. *Yamaha Motor Corp., U.S.A. v Calhoun* (1996) 516 US 199, 133 L Ed 2d 578, 116 S Ct 619. Similarly, the Federal Boat Safety Act of 1971 (FBSA) (46 USC §§4301-4311) does not preempt a state law damages claim alleging that a boat motor that lacked propeller guards was defectively designed. See *Sprietsma v Mercury Marine* (2002) 537 US 51, 154 L Ed 2d 466, 123 S Ct 518, which does not, however, refer to a contrary result reached in *Moss v Outboard Marine Corp.* (ED Cal 1996) 915 F Supp 183. See *LaPlante v Wellcraft Marine Corp.* (2001) 94 CA4th 282, 114 CR2d 196 (no FBSA preemption of claim based on negligent installation of safety devices).

Grants of federal jurisdiction over lawsuits for injury arising out of nuclear incidents do not prevent damages recovery under state product liability law. See *Kennedy v Southern Cal. Edison Co.* (9th Cir 2001) 268 F3d 763, 767 (suit against nuclear fuel rod supplier alleging wife's death resulted from exposure to nuclear fuel particles husband unknowingly carried home on clothing and body), also noted in §11.20.

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§11.46 6. State Statutory Immunities

A motor vehicle dealer who sells a vehicle "as is" to another dealer is exempted by Veh C §24007 from liability for injuries caused by defects in the vehicle. See *Power Tool & Supply Co. v Lakeside Chevrolet Co.* (1984) 154 CA3d 947, 951, 201 CR 702 (Veh C §24007 is constitutional and exempts dealer who sold trailer to other dealer); *Fruehauf Corp. v Lakeside Chevrolet Co.* (1981) 117 CA3d 783, 173 CR 55 (first dealer not liable to indemnify second dealer, who sold trailer to member of public).

Although the legislature has the power to create statutory immunity to strict liability, it did not do so for vaccine manufacturers when it created an immunity for an "act or omission in the administration" of a vaccine. Health & S C §120455; *Flood v Wyeth Labs.* (1986) 183 CA3d 1272, 228 CR 700.

A manufacturer or seller is immune from liability in a product liability action for harm caused by the ingestion of a "common consumer product intended for personal consumption," such as sugar, castor oil, alcohol, or butter, that is inherently unsafe and is consumed with ordinary community knowledge of its dangers. CC §1714.45.

See Note in §11.14 (state emergency powers act may nullify manufacturer's duty to warn).

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§11.47 7. Product Unavoidably Unsafe

California courts have not imposed strict product liability on the supplier of an unavoidably unsafe product (a product "whose norm is danger"), unless the product was marketed without adequate warnings, instructions, or packaging. See generally §11.1 (basic concepts), §11.5 (what constitutes a "defect"), §§11.14-11.18 (absence of adequate warnings or instructions).

NOTE: To impose liability on the supplier of, for example, a carving knife that could not feasibly have been made safer except by making it duller, would convert strict product liability into "genuine" strict liability. See *Barker v Lull Eng'g Co.* (1978) 20 C3d 413, 430 n10, 143 CR 225; *Grinnell v Charles Pfizer & Co.* (1969) 274 CA2d 424, 435 n7, 79 CR 369, 375; *Toole v Richardson-Merrell, Inc.* (1967) 251 CA2d 689, 710, 60 CR 398, 412. See also Restatement (Second) of Torts §402A, Comment k (1965); Prosser, *Strict Liability to the Consumer in California*, 18 Hastings LJ 9, 23 (1966).

Before a judge may instruct a jury that a product supplier cannot be strictly liable for injury caused by an unavoidably unsafe product, some evidentiary basis must exist for concluding that a product is unavoidably unsafe. In some situations, expert opinion may be necessary. *Wilkinson v Bay Shore Lumber Co.* (1986) 182 CA3d 594, 227 CR 327 (unavoidability of dry rot in lumber is not within realm of common experience; thus, expert evidence required before jury could consider it).

On the application of the "unavoidably unsafe product" discussion in Restatement §402A, Comment k, to prescription drugs, see *Brown v Superior Court* (1988) 44 C3d 1049, 1066, 245 CR 412 (effectively overruling *Kearl v Lederle Labs.* (1985) 172 CA3d 812, 218 CR 453); *Hopkins v Dow Corning Corp.* (9th Cir 1994) 33 F3d 1116, 1125 (breast implants). See generally, on warnings with pharmaceuticals, §13.22.

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II. NEGLIGENCE LIABILITY

§11.48 A. Negligence as Alternative to Strict Product Liability

The plaintiff in a product liability case may seek recovery at the same time on theories of negligence and strict liability in tort; the plaintiff is not required to elect to proceed on one theory or the other. *Jiminez v Sears, Roebuck & Co.* (1971) 4 C3d 379, 387, 93 CR 769. See *Balido v Improved Mach., Inc.* (1972) 29 CA3d 633, 640, 105 CR 890 (strict liability, negligence, and warranty counts stated single cause of action). Negligence and res ipsa loquitur instructions can be useful to the plaintiff when it is difficult to identify the particular defect that caused the injury (as in *Jiminez*). See *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 540, 138 CR 705, 711 (special finding that car had no defect when sold did not preclude verdict that manufacturer was negligent), disapproved on other grounds in *Soule v General Motors Corp.* (1994) 8 C4th 548, 580, 34 CR2d 607. See also *Casetta v United States Rubber Co.* (1968) 260 CA2d 792, 799, 67 CR 645, 649 (failure to warn of special hazards); *Cracknell v Fisher Governor Co.* (1967) 247 CA2d 857, 860, 56 CR 64, 67 (negligent installation, servicing); *Swett v Gribaldo, Jones & Assocs.* (1974) 40 CA3d 573, 115 CR 99 (soils engineering firm that had reported to developer could be liable for negligence or intentional misconduct, but not on theory of strict liability). On the other hand, jury findings that a product (1) was not defective but (2) was negligently designed are inconsistent and require reversal of a judgment for the plaintiff. *Lambert v General Motors* (1998) 67 CA4th 1179, 79 CR2d 657.

Negligence may be asserted as an alternative basis of liability against the following:

- A manufacturer or a seller (see *Gherna v Ford Motor Co.* (1966) 246 CA2d 639, 650, 55 CR 94, 101; *Canifax v Hercules Powder Co.* (1965) 237 CA2d 44, 56, 46 CR 552, 559 (manufacturer and wholesaler)), or
- A bailor (see *Price v Shell Oil Co.* (1970) 2 C3d 245, 252, 85 CR 178 (strict liability not inconsistent with CC §1955); *McClaflin v Bayshore Equip. Rental Co.* (1969) 274 CA2d 446, 451, 79 CR 337, 340 (same)).

In a product liability action, the plaintiff has a right to independent jury consideration of both strict liability and negligence theories. *Curtis v State* (1982) 128 CA3d 668, 690, 180 CR 843 (finding of "no defect" does not necessarily preclude finding of negligence). Evidence that a car manufacturer knew that the brakes in a certain model tended to fail due to fluid vaporization, but took no steps (such as warning dealers and users or installing a dual master cylinder) to eliminate the danger, supported liability for negligence as well as strict product liability. *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 400, 185 CR 654 (punitive damages for conscious disregard of public safety).

Although a plaintiff can normally ask for instructions on both strict product liability and negligence theories, strict liability instructions may be enough in a non-res ipsa loquitur case involving only a manufacturing defect. *Montez v Ford Motor Co.* (1980) 101 CA3d 315, 161 CR 578 (trial court's refusal to give negligence instructions not reversible error). However, failure to give negligence instructions is reversible error if the strict product liability instructions given were inadequate or incorrect. *Lunghi v Clark Equip. Co.* (1984) 153 CA3d 485, 491, 200 CR 387, 389 (court failed to instruct that absence of warning may constitute design defect).

Pleading a negligence cause of action does not enable a buyer in a commercial transaction to invoke product liability concepts to recover damages for purely economic loss. *Sacramento Regional Transit Dist. v Grumman Flxible* (1984) 158 CA3d 289, 298, 204 CR 736 (see §§11.24, 11.27). But see *Huang v Garner* (1984) 157 CA3d 404, 421, 203 CR 800, disapproved on other grounds at 24 C4th 649 (purchasers of building entitled to damages for economic loss in professional negligence claims against designer and civil engineer and in negligence claims against owner and developer); *Pisano v American Leasing* (1983) 146 CA3d 194, 197, 194 CR 77 (cabinetmaker could recover damages for lost profits and lost business opportunities by proving negligence of supplier of defective sander).

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§11.49 1. Persons to Whom Duty of Care Owed

Negligence liability does not depend on privity of contract between the parties. The manufacturer's duties are owed to anyone who ought to be expected to use the chattel or be in the vicinity of its use. *Pike v Frank G. Hough Co.* (1970) 2 C3d 465, 470, 85 CR 629 (bystander); *Sheward v Virtue* (1942) 20 C2d 410, 412, 126 P2d 345 (buyer's customer); *Kalash v Los Angeles Ladder Co.* (1934) 1 C2d 229, 231, 34 P2d 481, 482 (purchaser's employee). See Restatement (Second) of Torts §§395, 398 (1965).

The foreseeability component of a legal duty is not satisfied when the defendant's conduct posed no risk of serious harm to a "sufficiently appreciable segment of the general public." See *Friedman v Merck & Co.* (2003) 107 CA4th 454, 466, 131 CR2d 885 (manufacturer of TB test containing animal products owed no duty to "strict ethical vegan" who felt emotional distress).

The duties of a bailor or other supplier are also owed to all persons who should be expected to use the chattel or be endangered by its probable use. Restatement §408. See *McNeal v Greenberg* (1953) 40 C2d 740, 742, 255 P2d 810, 811 (bailee); *Rae v California Equip. Co.* (1939) 12 C2d 563, 569, 86 P2d 352, 355 (bailee's employee); *Zucker v Passetti Trucking Co.* (1961) 191 CA2d 260, 265, 12 CR 692, 695 (bystander).

See §11.61 on exemption agreements and disclaimers.

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§11.50 2. Duty in Design and Manufacture

A manufacturer is obligated to use reasonable care in producing any article that, if carelessly made, is likely to injure persons when used in a foreseeable manner (*Reynolds v Natural Gas Equip.* (1960) 184 CA2d 724, 736, 7 CR 879, 886; Restatement (Second) of Torts §395 (1965)), whether or not the article is inherently dangerous (*Nebelung v Norman* (1939) 14 C2d 647, 654, 96 P2d 327, 330).

The care required is that care commensurate with the danger of using the product (*Dow v Holly Mfg. Co.* (1958) 49 C2d 720, 727, 321 P2d 736, 740), including due care in assembling parts and in making tests and inspections during fabrication and after completion (*Sheward v Virtue* (1942) 20 C2d 410, 414, 126 P2d 345, 346). See Restatement §395, comment f. See Anno, 6 ALR3d 91, 102 (1966) (manufacturer's duty to test or inspect).

The manufacturer must also use reasonable care in the design of the product, including use of all safety devices reasonably indicated. *Pike v Frank G. Hough Co.* (1970) 2 C3d 465, 470, 85 CR 629, 632 (no rearview mirrors or backup warning signal); *Varas v Barco Mfg. Co.* (1962) 205 CA2d 246, 258, 22 CR 737, 744 (inadequate gas cap); *Reynolds v Natural Gas Equip.* (1960) 184 CA2d 724, 737, 7 CR 879, 887 (air cap on burner could be closed too narrowly); Restatement §398. See Annos, 78 ALR2d 594 (1961) (injury from machinery), 96 ALR3d 22, 61 (1980) (duty in product design).

There is no duty to make the product totally accident-proof. *Hatch v Ford Motor Co.* (1958) 163 CA2d 393, 396, 329 P2d 605, 607 (radiator ornament injured pedestrian). However, an automobile manufacturer must produce a reasonably crashworthy vehicle, one designed to minimize the effects of foreseeable accidents. *Cronin v J.B.E. Olson Corp.* (1972) 8 C3d 121, 104 CR 433.

A manufacturer's compliance with industry standards does not necessarily insulate it from negligence liability. *Hasson v Ford Motor Co.* (1982) 32 C3d 388, 407, 185 CR 654.

Under the "carpenter-architect" defense, liability for negligence in designing a component cannot be imposed on a component manufacturer that followed the design dictated by the assembler of final product and had no design authority of its own. See *S.A. Empresa De Viacao Aerea Rio Grandense (Varig Airlines) v Walter Kidde & Co.* (9th Cir 1982) 690 F2d 1235 (sink and towel dispenser for airliner).

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§11.51 3. Responsibility for Another's Product; Parts

A company that puts out as its own product (by trade name or otherwise) an item made by another is subject to the same liability as if it were the actual manufacturer. *Dow v Holly Mfg. Co.* (1958) 49 C2d 720, 727, 321 P2d 736; Restatement (Second) of Torts §400 (1965). Similarly, the manufacturer of the completed product is vicariously liable for defects caused by negligence of parts suppliers or subcontractors. *Sheward v Virtue* (1942) 20 C2d 410, 412, 126 P2d 345, 346 (defective parts). See *Vandermark v Ford Motor Co.* (1964) 61 C2d 256, 261, 37 CR 896, 898 (rule stated). See Anno, 3 ALR3d 1016, 1019 (1965) (divergent views on vicarious fault).

The parts manufacturer is also liable for its own negligence. *Edison v Lewis Mfg. Co.* (1959) 168 CA2d 429, 436, 336 P2d 286, 290.

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§11.52 4. Duty in Installation and Maintenance

Anyone who supplies and installs a product has a duty to use reasonable care in its installation. *Reynolds v Natural Gas Equip.* (1960) 184 CA2d 724, 737, 7 CR 879, 887. Apart from strict liability, however, a supplier who is not the manufacturer is not required to disassemble the product to discover latent defects. *Post v Alameda Amusement Co.* (1953) 117 CA2d 588, 592, 256 P2d 580, 582 (installation by buyer).

A person who undertakes the maintenance or repair of a product is liable for negligent performance of those services. See, *e.g., Hasson v Ford Motor Co.* (1977) 19 C3d 530, 546, 138 CR 705, disapproved on other grounds at 8 C4th 574 (servicer failed to replace brake fluid).

A product manufacturer or supplier that knows of a dangerous defect in a previously sold product may be liable for a negligent failure to provide for the recall or retrofitting of the product. See *Springmeyer v Ford Motor Co.* (1998) 60 CA4th 1541, 71 CR2d 190; *Hernandez v Badger Constr. Equip. Co.* (1994) 28 CA4th 1791, 34 CR2d 732; *Lunghi v Clark Equip. Co.* (1984) 153 CA3d 485, 200 CR 387; *Balido v Improved Mach., Inc.* (1972) 29 CA3d 633, 105 CR 890.

Absent a special agreement (see *Jaehne v Pacific Tel. & Tel. Co.* (1951) 105 CA2d 683, 688, 234 P2d 165, 168 (maintenance of telephone equipment)), a bailor or other supplier is not obligated to inspect the property after its delivery to the customer and is not ordinarily liable for injury caused by a defect that appears after delivery. *Dickson v Southern Cal. Edison Co.* (1955) 136 CA2d 85, 88, 288 P2d 310, 311 (rented truck). But see *Ellison v Shell Oil Co.* (9th Cir 1989) 882 F2d 349 (railroad car owner has duty to railroad and brakemen to make reasonable inspection). See Anno, 46 ALR2d 404, 423 (1956) (bailor of vehicle). However, a bailor's failure to repair after notice or in breach of an agreement might be actionable. See CC §1955.

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5. Supplier's Duty to Inspect and Warn

§11.53 a. Manufacturers and Sellers

The manufacturer or seller of a product must give adequate warning to ultimate users of dangers in the product as it is expected to be used. *Tingey v E.F. Houghton & Co.* (1947) 30 C2d 97, 102, 179 P2d 807, 811 (danger of explosion if chemicals mixed); *Casetta v United States Rubber Co.* (1968) 260 CA2d 792, 816, 67 CR 645, 660 (mounting tires on certain rims); *Gherna v Ford Motor Co.* (1966) 246 CA2d 639, 651, 55 CR 94, 102 (flammability of transmission fluid); *Love v Wolf* (1964) 226 CA2d 378, 395, 38 CR 183, 193 (side effects of drug); Restatement (Second) of Torts §§388, 399 (1965). See Anno, 76 ALR2d 9, 16 (1961) (duty to warn generally). But see *Bojorquez v House of Toys, Inc.* (1976) 62 CA3d 930, 133 CR 483 (no breach of duty in selling 10-cent slingshot to 10-year-old without warning of risk to others).

Whether a manufacturer can satisfy its duty by warning third persons who will resell, apply, or administer the product depends on the adequacy of the warning under the circumstances. *Tingey v E.F. Houghton & Co.* (1947) 30 C2d 97, 103, 179 P2d 807, 811 (need for warning label); *Larramendy v Myres* (1954) 126 CA2d 636, 641, 272 P2d 824, 827 (inherently dangerous product with insufficient written directions); Restatement §388, comment n. But see *Magee v Wyeth Labs., Inc.* (1963) 214 CA2d 340, 350, 29 CR 322, 336 (drug manufacturer's warning to physicians sufficient).

A product supplier who knows, or has reason to know, that the product is dangerous for its intended use is liable for failure to exercise reasonable care in warning the buyer of the dangers, even though the product was made in compliance with plans furnished by the buyer. *Rawlings v D.M. Oliver, Inc.* (1979) 97 CA3d 890, 896, 159 CR 119. See *DeLeon v Commercial Mfg. & Supply Co.* (1983) 148 CA3d 336, 348, 195 CR 867 (manufacturer's duty to prevent product from being placed in unsafe location).

A manufacturer that has assumed an obligation to test component parts for defects can be liable for failing to detect a defect about which a warning should have been given. See *Brocklesby v U.S.* (9th Cir 1985) 767 F2d 1288 (although manufacturer of airport approach chart could not alter FAA-prescribed airport approach procedure to render it safe, manufacturer could examine procedure for defects, seek corrections from FAA, and provide warnings).

A manufacturer that fails to warn purchasers of a known latent defect is negligent even when the circumstances under which the danger might occur are limited, compared with the total number of uses to which the product will be put. *John Norton Farms, Inc. v Todagco* (1981) 124 CA3d 149, 174, 177 CR 215 (crop destroyed by agricultural herbicide).

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§11.54 b. Bailors

The bailor of personal property for compensation, or for the mutual benefit of bailor and bailee, must make reasonable inspections to discover the property's condition, and must either use reasonable care to make it safe for its intended use or disclose its condition to the bailee. *McNeal v Greenberg* (1953) 40 C2d 740, 742, 255 P2d 810, 811 (tractor); *Rae v California Equip. Co.* (1939) 12 C2d 563, 569, 86 P2d 352, 355 (hoist); *Varas v Barco Mfg. Co.* (1962) 205 CA2d 246, 258, 22 CR 737, 744 (earth compactor; defective design); *Tierstein v Licht* (1959) 174 CA2d 835, 840, 345 P2d 341, 345 (horse trailer); *Sproul v Cuddy* (1955) 131 CA2d 85, 94, 280 P2d 158, 163 (walker for invalid). See Restatement (Second) of Torts §408 (1965). See also CC §1955; *Price v Shell Oil Co.* (1970) 2 C3d 245, 249 n1, 85 CR 178.

A purely gratuitous bailment, without benefit to the bailor, imposes on the bailor a duty to warn of known defects. See *Kite v Coastal Oil Co.* (1958) 162 CA2d 336, 343, 328 P2d 45, 50. Lending a potentially dangerous item, however, may impose a duty of reasonable inspection. See *Tierstein v Licht* (1959) 174 CA2d 835, 842, 345 P2d 341, 345. See Restatement §388, Comment c (1965).

See Anno, 46 ALR2d 404 (1956) (vehicles).

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§11.55 6. Bailee's Liability

The bailee is liable to the bailor for loss of or damage to the property bailed in the following circumstances:

- When injury results from the bailee's negligence (*George v Bekins Van & Storage Co.* (1949) 33 C2d 834, 842, 205 P2d 1037, 1043 (fire from smoking); *Greenberg Bros. v Ernest W. Hahn, Inc.* (1966) 246 CA2d 529, 533, 54 CR 770, 772 (permitting pilferage); see CC §1928; or
- When, without negligence, loss results from a violation of or deviation from the terms of the bailment (CC §1630; *Constantian v Mercedes Benz Co.* (1936) 5 C2d 631, 633, 55 P2d 841, 842 (removal of goods contrary to contract); *Sperisen v Heynemann* (1957) 149 CA2d 228, 231, 308 P2d 436, 438 (public display of articles not contemplated)).

In other situations, the property loss falls on the bailor absent a contrary agreement. *Los Angeles Warehouse Co. v American Distilling Co.* (1943) 22 C2d 402, 406, 139 P2d 641, 642.

Apart from the special motor vehicle rules (see §§4.28-4.40), the bailee's duties to third persons are based on general negligence principles under which he may be liable for failure to warn of or to repair known defects in the article bailed or, if under a special relationship, for failure to make reasonable inspections to ascertain the condition and fitness of the property. *Tierstein v Licht* (1959) 174 CA2d 835, 839, 345 P2d 341, 345 (bailee's duty to his invitee); *Biondini v Amship Corp.* (1947) 81 CA2d 751, 763, 185 P2d 94, 103 (duty to invited workers). See Restatement (Second) of Torts §§388, 405 (1965).

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B. Proof

§11.56 1. Product Failure; Res Ipsa Loquitur

Negligence and res ipsa loquitur instructions may be given in addition to strict liability instructions, unless those instructions, under the facts, would be confusing, superfluous, or inconsistent. *Jiminez v Sears, Roebuck & Co.* (1971) 4 C3d 379, 383, 93 CR 769. That is, if an article explodes, burns, breaks, or otherwise fails in normal use, a presumption arises that the product was negligently designed, manufactured, installed, or supplied, and the presumption may be applied against everyone involved in the marketing process if it is shown that the product was not mishandled or its condition otherwise changed after each respective defendant relinquished control. *Burr v Sherwin Williams Co.* (1954) 42 C2d 682, 687, 268 P2d 1041, 1044 (contaminated pesticide); *Zentz v Coca Cola Bottling Co.* (1952) 39 C2d 436, 444, 247 P2d 344, 348 (bottle exploded); *Hinckley v La Mesa R.V. Ctr.* (1984) 158 CA3d 630, 639, 205 CR 22 (fire in engine compartment of relatively new motor home 7 months after defendant had repaired damage from earlier fire); *Preissman v Ford Motor Co.* (1969) 1 CA3d 841, 854, 82 CR 108 (car parking gear failed); *Gherna v Ford Motor Co.* (1966) 246 CA2d 639, 647, 55 CR 94, 99 (fire in automobile engine); *Reynolds v Natural Gas Equip.* (1960) 184 CA2d 724, 731, 7 CR 879, 884 (gas burner exploded). See §§1.38-1.43 on the res ipsa loquitur presumption.

Res ipsa loquitur may also apply in bailment situations on direct proof of a defect existing at the time of bailment, or when the nature of the accident indicates a defect and the article was not mishandled or changed after the bailee took possession. *McNeal v Greenberg* (1953) 40 C2d 740, 744, 255 P2d 810, 813 (tractor brake failed); *Kite v Coastal Oil Co.* (1958) 162 CA2d 336, 343, 328 P2d 45, 50 (prior defect shown); *Rohar v Osborne* (1955) 133 CA2d 345, 349, 284 P2d 125, 127 (weed burner exploded). See Anno, 46 ALR2d 404, 411 (1956) (bailment of automotive equipment).

The doctrine does not apply, however, in the following situations:

- The condition is one that might occur even if the maker or installer was not negligent (*Fuller v Sears, Roebuck & Co.* (1982) 136 CA3d Supp 1, 5, 186 CR 26 (automobile tire blew out 6 months after it had been purchased and installed); see also *Moreno v Sayre* (1984) 162 CA3d 116, 208 CR 444 (evidence concerning punch press malfunction too weak to justify res ipsa loquitur instruction));
- The article was materially changed (*McCurter v Norton Co.* (1968) 263 CA2d 402, 408, 69 CR 493, 496);
- The plaintiff failed to negate mishandling after the defendant relinquished control (*Andrews v Barker Bros.* (1968) 267 CA2d 530, 534, 73 CR 284, 287); or
- The plaintiff did not sufficiently eliminate his own conduct as a cause of the accident (*Casetta v United States Rubber Co.* (1968) 260 CA2d 792, 809, 67 CR 645, 656).

The plaintiff may have to introduce expert evidence to establish negligence (or strict liability) if the subject matter is beyond common experience. See *Miller v Los Angeles County Flood Control Dist.* (1973) 8 C3d 689, 703, 106 CR 1 (expert testimony insufficient to establish negligence in construction of house destroyed by flood).

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§11.57 2. Presumption of Negligence From Violation of Statute or Regulation

A rebuttable presumption of negligence (see §1.31) arises if the defendant supplies a product without safeguards required by a provision enacted for the protection of a class of which the plaintiff is a member. See *Rae v California Equip. Co.* (1939) 12 C2d 563, 568, 86 P2d 352, 355 (hoist); *Di Muro v Masterson Trusafe Steel Scaffold Co.* (1961) 193 CA2d 784, 791, 14 CR 551, 555 (scaffold). See also *Elsworth v Beech Aircraft Corp.* (1984) 37 C3d 540, 547, 208 CR 874 (no federal law preemption of state law negligence presumption based on product's failure to comply in design with federal safety regulations; see discussion in §11.8). But see *Traxler v Varady* (1993) 12 CA4th 1321, 16 CR2d 297 (presumption not applicable against supplier of AIDS-tainted blood; see §9.3).

See §6.4 on Lab C §6304.5, which, at least until amended effective January 1, 2000, forbade reliance on or reference to Labor Code safety provisions and safety orders promulgated under the Labor Code.

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§11.58 3. Causation; Lapse of Time

In a product liability lawsuit based on negligence, as in other tort cases, proximate cause may be established by circumstantial evidence. *Varas v Barco Mfg. Co.* (1962) 205 CA2d 246, 262, 22 CR 737, 746. The lapse of considerable time between the sale or lease of a product and an accident does not necessarily preclude an inference that a product defect was the cause. See *Hale v Depaoli* (1948) 33 C2d 228, 231, 201 P2d 1, 3 (railing gave way 18 years after construction; but see §§6.18-6.20 on present statutory time limits in construction defect cases); *Reynolds v Natural Gas Equip.* (1960) 184 CA2d 724, 738, 7 CR 879, 888 (lapse between shipping and installation); *Darling v Caterpillar Tractor Co.* (1959) 171 CA2d 713, 722, 341 P2d 23 (equipment failure 3 years after sale). But see *Dickson v Southern Cal. Edison Co.* (1955) 136 CA2d 85, 87, 288 P2d 310 (subsequent misuse or ordinary wear was only reasonable explanation of accident). See §11.20 on recovery under negligence theory for defects that have not yet damaged the product (houses).

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C. Defenses

§11.59 1. Contributory Fault

Contributory negligence is a defense to product liability based on negligence. *Hasson v Ford Motor Co.* (1977) 19 C3d 530, 548, 138 CR 705, disapproved on other grounds at 8 C4th 574 (contributory negligence proved by circumstantial evidence; defense even if foreseeable by defendant). See Annos, 78 ALR2d 460, 489 (1961) (vehicles), 78 ALR2d 594, 613 (1961) (machinery). Since 1975, comparative fault principles apply. See §1.41.

Contributory fault may reduce damages if the plaintiff

- mishandles the product (see *Davis v Safeway Stores, Inc.* (1969) 271 CA2d 365, 370, 76 CR 490, 494), or
- continues to use it after he discovers or should have discovered the defect or danger (*Saeter v Harley Davidson Motor Co.* (1960) 186 CA2d 248, 257, 8 CR 747, 752 (condition of motorcycle)) and understood the degree of the danger as well as the danger itself (*Brooks v Allis-Chalmers Mfg. Co.* (1958) 163 CA2d 410, 415, 329 P2d 575, 578).

Less caution is generally required of workers using products because of their need to attend to the work. *Varas v Barco Mfg. Co.* (1962) 205 CA2d 246, 263, 22 CR 737, 747.

The obviousness of the danger is relevant to contributory negligence, but it is not conclusive, depending on the plaintiff's status as a user or bystander, the degree of danger involved, and related factors. *Pike v Frank G. Hough Co.* (1970) 2 C3d 465, 473, 85 CR 629 (bystander).

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§11.60 2. Assumption of Risk

Under the present formulation of assumption of the risk, a consumer's use of a product known to be defective would be a "secondary," *i.e.,* a form of contributory negligence that might require a comparative reduction of damages but would not be a complete bar to recovery. See *Daly v General Motors Corp.* (1978) 20 C3d 725, 742, 144 CR 380, 390. See §§1.43, 1.46-1.53. See also discussion in §11.43.

Even before the adoption of comparative fault, assumption of risk was rarely a defense in product liability cases (see *Sperling v Hatch* (1970) 10 CA3d 54, 62, 88 CR 704) because it requires proof that the plaintiff

- actually knew of the particular danger and of the magnitude of the risk involved (*Vierra v Fifth Ave. Rental Serv.* (1963) 60 C2d 266, 270, 32 CR 193, 196; *Shahinian v McCormick* (1963) 59 C2d 554, 567, 30 CR 521, 528), and
- voluntarily exposed himself to that danger (*Brooks v Allis-Chalmers Mfg. Co.* (1958) 163 CA2d 410, 415, 329 P2d 575, 578 (workman's use of equipment not voluntary)).

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§11.61 3. Exculpatory Agreements and Disclaimers

Exculpatory provisions in sales or rental documents have limited effect on tort liability because of the following:

- Even a party to the transaction is not bound by an exemption provision without proof of his assent to it (see *McNeal v Greenberg* (1953) 40 C2d 740, 745, 255 P2d 810, 813 (rental agreement not signed); *California State Auto. Ass'n Inter-Ins. Bureau v Barrett Garages, Inc.* (1967) 257 CA2d 71, 76, 64 CR 699, 704 (parking claim check issued by bailee));
- Disclaimers are restricted to warranty claims if negligence is not expressly mentioned (*Sproul v Cuddy* (1955) 131 CA2d 85, 94, 280 P2d 158, 163 (rental); *Basin Oil Co. v Baash-Ross Tool Co.* (1954) 125 CA2d 578, 596, 271 P2d 122, 132 (sales));
- Exemption agreements in public interest transactions are invalid even between the parties (see §1.54 on exculpatory agreements generally); and
- Liability exemptions are not binding on third persons who are not parties to the transaction (see *Larson v Santa Clara Valley Water Conserv. Dist.* (1963) 218 CA2d 515, 524, 32 CR 875, 879 (real property lease); *Both v Harband* (1958) 164 CA2d 743, 747, 331 P2d 140, 143 (same)).

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III. WARRANTY LIABILITY

A. Effect of Strict Product Liability on Warranty Rules

§11.62 1. Sales

In damages lawsuits for harm or loss to person or property from defective products, the strict product liability theory has largely superseded warranty liability. *Grinnell v Charles Pfizer & Co.* (1969) 274 CA2d 424, 432, 79 CR 369, 373. See *Read v Safeway Stores, Inc.* (1968) 264 CA2d 404, 406, 70 CR 454, 456 (no need to consider whether complaint stated cause of action for breach of warranty).

A plaintiff may, however, plead that the injury resulted from a product supplier's breach of warranty (see Com C §2715(2)(b)), and may proceed on alternative theories if the jury instructions adequately distinguish them. See *Hauter v Zogarts* (1975) 14 C3d 104, 120 CR 681; *Barth v B.F. Goodrich Tire Co.* (1968) 265 CA2d 228, 245, 71 CR 306, 315 (plaintiff's instructions upheld). But see *Hutchinson v Revlon Corp.* (1967) 256 CA2d 517, 525, 65 CR 81, 85 (instructions confusing).

Pursuing a breach or warranty theory may even be essential to recovery if

- the product was not defective but failed to conform to the warranty (see *Grinnell v Charles Pfizer & Co.* (1969) 274 CA2d 424, 438, 79 CR 369, 377; but see *Hinckley v La Mesa R.V. Ctr.* (1984) 158 CA3d 630, 644, 205 CR 22 (plaintiff must produce evidence of product defect to invoke breach of warranty; jury question whether plaintiff's modifications of product voided warranties));
- the plaintiff claims commercial losses, to which the strict liability rule does not apply (see §11.24);
- the plaintiff is a product user who deals with the supplier from a position of relatively equal economic strength and can bargain the specifications of the product and negotiate the risk of loss from defects in it (*Kaiser Steel Corp. v Westinghouse Elec. Corp.* (1976) 55 CA3d 737, 127 CR 838; see §11.27); or
- the furnishing of the product is deemed a service rather than a sale (see §§11.29, 11.36-11.37).

NOTE: Prescription drug suppliers may be exempt from breach of warranty liability, which is a form of strict liability, under the view that there can be no strict product liability for design defects in prescription drugs. See *Brown v Superior Court* (1988) 44 C3d 1049, 1069, 245 CR 412. See §11.47.

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§11.63 2. Bailments

Strict product liability probably has entirely superseded implied warranty as a basis for personal injury and property damage lawsuits arising from bailments. See *McClaflin v Bayshore Equip. Rental Co.* (1969) 274 CA2d 446, 451, 79 CR 337, 339. The bailor's implied warranty in these cases is essentially an undertaking to use reasonable care. *McNeal v Greenberg* (1953) 40 C2d 740, 742, 255 P2d 810, 811; *Tierstein v Licht* (1959) 174 CA2d 835, 841, 345 P2d 341, 345.

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B. Elements of Warranty Liability

§11.64 1. Implied Warranty of Fitness for Particular Purpose

When the seller has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill and judgment to select or furnish suitable goods, there is ordinarily an implied warranty that the goods are fit for that purpose. Com C §2315. Essential elements of this warranty are that the seller be apprised of the intended use and that the buyer rely on the seller in selecting the product. *Odell v Frush* (1956) 146 CA2d 504, 509, 304 P2d 45, 49. The warranty is breached if the product is not suitable for the intended use. *Tremeroli v Austin Trailer Equip. Co.* (1951) 102 CA2d 464, 475, 227 P2d 923, 931.

Purchase of an article under its trade name does not preclude an implied warranty of fitness. See *Barth v B.F. Goodrich Tire Co.* (1968) 265 CA2d 228, 245 n6, 71 CR 306, 316.

The element of reliance is lacking, however, if

- the buyer selects the article on the basis of his own examination (*Keith v Buchanan* (1985) 173 CA3d 13, 220 CR 392 (experienced sailor who had friends examine boat before purchase did not rely on seller's skill or judgment; however, express warranty liability not precluded); *Holmes Packaging Mach. Corp. v Bingham* (1967) 252 CA2d 862, 873, 60 CR 769, 776 (bailment)); or
- the product is supplied as specified in the buyer's own plans and specifications (*Carpenter Steel Co. v Pellegrin* (1965) 237 CA2d 35, 37, 46 CR 502, 504).

There is no implied warranty of any kind with regard to defects that an examination should reveal if before the sale the buyer fully examined the goods or refused to do so. Com C §2316(3)(b).

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§11.65 2. Implied Warranty of Merchantability

A warranty that goods are merchantable is inserted by law into every contract of sale, including the sale of food or drink, if the seller deals in goods of that kind. Com C §2314(1); *Hauter v Zogarts* (1975) 14 C3d 104, 117, 120 CR 681. See Com C §2316(3)(b) (patent defects); *Holmes Packaging Mach. Corp. v Bingham* (1967) 252 CA2d 862, 874, 60 CR 769, 776 (bailor did not deal in product leased). Proof that the implied warranty of merchantability was breached entitles the purchaser to the return of the purchase price plus interest, conditioned on return of the product; the seller is not entitled to repair defects and keep the purchase price. *Mocek v Alfa Leisure, Inc.* (2003) 114 CA4th 402, 7 CR3d 546 (travel trailer).

To be merchantable, goods must be, among other things, fit for the ordinary purposes for which such goods are used. Com C §2314(2). See *Hauter v Zogarts, supra* (ball on golf training device hit user's head); *Simmons v Rhodes & Jamieson, Ltd.* (1956) 46 C2d 190, 193, 293 P2d 26, 29 (ordinary-uses test met); *Burr v Sherwin Williams Co.* (1954) 42 C2d 682, 694, 268 P2d 1041, 1049 (impurity; label disclaimer insufficient); *Harris v Belton* (1968) 258 CA2d 595, 606, 65 CR 808, 815 (labeling adequate).

Plaintiffs pursuing a breach of the merchantability warranty must stand in "vertical privity" with the defendants; they must occupy adjoining links in the distribution chain. See *Clemens v DaimlerChrysler Corp.* (9th Cir 2008) 534 F3d 1017 (end consumer who buys from a retailer is not in privity with manufacturer); *Kennedy v Baxter Healthcare Corp*. (1996) 43 CA4th 799, 810, 50 CR2d 736 (class action inappropriate for claims by many health care workers for injury caused by latex gloves).

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§11.66 3. Express Warranties

Express warranties arise when, as part of the basis of the bargain, the seller makes an affirmation of fact or a promise relating to the goods, or describes them, or furnishes a model or sample; but an affirmation of value or a statement of the seller's opinion or a commendation does not ordinarily create a warranty. Com C §2313. An express warranty is generally founded on an undertaking or representation that the product is or is not of a certain quality or capacity. *Hauter v Zogarts* (1975) 14 C3d 104, 114, 120 CR 681 (golf practice device stated to be "completely safe[,] ball will not hit player"); *Grinnell v Charles Pfizer & Co.* (1969) 274 CA2d 424, 440, 79 CR 369, 378 (quality of vaccine). See also *Atkinson v Elk Corp.* (2006) 142 CA4th 212, 48 CR3d 247 (roofing shingles were consumer product under 15 USC §2301; action on express warranty not subject to 1-year limitations period on merchantability warranties under CC §1791.1).

Vehicle manufacturers may expressly limit the duration of warranties. See *Daugherty v American Honda Motor Co.* (2006) 144 CA4th 824, 51 CR3d 118 (engine defect caused problems only after 57,000 to 100,000 miles).

Statements of opinion may constitute express warranties if made by a person apparently having superior knowledge or special information on which the buyer or consumer is entitled to rely. *Grinnell v Charles Pfizer & Co., supra* (vaccine manufacturer); *Toole v Richardson-Merrell, Inc.* (1967) 251 CA2d 689, 706, 60 CR 398, 411 (drug manufacturer). The statements must be more than mere generalities, however. *Harris v Belton* (1968) 258 CA2d 595, 605, 65 CR 808, 814.

Print and television advertisements showing people standing and sitting in the cargo beds of stationary pickup trucks do not amount to an express warranty that it is safe to ride there unrestrained. *Maneely v General Motors Corp.* (9th Cir 1997) 108 F3d 1176, 1181 (plaintiffs were injured while sleeping under tarp cargo bed when driver fell asleep and ran truck into tree).

An express warranty may be incorporated into the sales contract (*Seely v White Motor Co.* (1965) 63 C2d 9, 13, 45 CR 17, 20), or it may consist of representations in the following:

- Descriptive labels on the product (*Burr v Sherwin Williams Co.* (1954) 42 C2d 682, 696, 268 P2d 1041, 1049 (chemical ingredients); *Lane v C.A. Swanson & Sons* (1955) 130 CA2d 210, 216, 278 P2d 723, 726 (boned chicken)),
- Descriptions accompanying the sale (*Klein v Asgrow Seed Co.* (1966) 246 CA2d 87, 99, 54 CR 609, 617),
- Brochures furnished in connection with the sale (*Grinnell v Charles Pfizer & Co.* (1969) 274 CA2d 424, 439, 79 CR 369, 378 (vaccine package insert); see *Greenman v Yuba Power Prods., Inc.* (1963) 59 C2d 57, 64, 27 CR 697, 701 (manufacturer's brochure)), or
- Advertising either alone (*Gherna v Ford Motor Co.* (1966) 246 CA2d 639, 652, 55 CR 94, 103) or coupled with labels (*Hauter v Zogarts, supra*; *Maecherlein v Sealy Mattress Co.* (1956) 145 CA2d 275, 276, 302 P2d 331 (billboard and radio); *Lane v C.A. Swanson & Sons* (1955) 130 CA2d 210, 215, 278 P2d 723, 726 (newspaper advertisements)).

A manufacturer or a seller is bound by express warranties made by its sales agent (CC §2323; *Alvarez v Felker Mfg. Co.* (1964) 230 CA2d 987, 997, 41 CR 514, 520) but not by the representations of third persons (*Grinnell v Charles Pfizer & Co.* (1969) 274 CA2d 424, 438, 79 CR 369, 377).

The element of buyer reliance on an express warranty (see *Burr v Sherwin Williams Co.* (1954) 42 C2d 682, 696, 268 P2d 1041, 1048) is now termed a representation that "becomes part of the basis of the bargain" (Com C §2313(1)). In sales of drugs and vaccines, reliance by the plaintiff's physician is sufficient. *Grinnell v Charles Pfizer & Co.* (1969) 274 CA2d 424, 441, 79 CR 369, 378 (polio vaccine); *Toole v Richardson-Merrell Inc., supra* (drug MER/29). See *Keith v Buchanan* (1985) 173 CA3d 13, 220 CR 392 (express warranty is presumptively part of basis of bargain; seller has burden of proving that bargain did not rest at all on representation, *e.g.,* by showing that buyer made own inspection and found defect or waived claim).

A magazine's advertisement of a product, absent the magazine's endorsement, cannot be considered a breach of warranty for which the magazine can be sued. *Walters v Seventeen Magazine* (1987) 195 CA3d 1119, 241 CR 101.

See Anno, 74 ALR3d 1298 (1976) (effect of statement on container that an enclosed item is safe).

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§11.67 4. Privity of Contract

A remote buyer, user, or consumer can invoke an *express* warranty if it is made directly to him by any of the following:

- The defendant (*Seely v White Motor Co.* (1965) 63 C2d 9, 13, 45 CR 17, 20 (manufacturer's warranty on dealer's purchase order)),
- The defendant's agent (*Hayman v Shoemake* (1962) 203 CA2d 140, 154, 21 CR 519, 528 (agent of wholesaler)), or
- Representations on labels, in advertising, or similar means (*Hauter v Zogarts* (1975) 14 C3d 104, 114 n8, 120 CR 681; *Burr v Sherwin Williams Co.* (1954) 42 C2d 682, 696, 268 P2d 1041, 1049 (labels); *Gherna v Ford Motor Co.* (1966) 246 CA2d 639, 652, 55 CR 94, 103 (advertising); *Klein v Asgrow Seed Co.* (1966) 246 CA2d 87, 101, 54 CR 609, 619 (labels and advertising)).

Privity of contract is not essential to recovery on *implied* warranty grounds when personal injuries are caused by an instrumentality that is dangerous because of latent defects. *Barth v B.F. Goodrich Tire Co.* (1968) 265 CA2d 228, 246, 71 CR 306, 317; *Alvarez v Felker Mfg. Co.* (1964) 230 CA2d 987, 997, 41 CR 514, 520. See *Gherna v Ford Motor Co., supra* (dictum). On the other hand, when the plaintiff seeks damages for a "commercial" or "economic" loss, not recoverable under a strict product liability or negligence theory (see §11.24), vertical privity is a prerequisite for recovery under theories of breach of an implied warranty of fitness or merchantability. *Fieldstone Co. v Briggs Plumbing Prods., Inc.* (1997) 54 CA4th 357, 371, 62 CR2d 701 (no tort damages recoverable by builder, whose contracts were with plumbing subcontractors, from manufacturer when 1900 sinks began to chip and rust prematurely). See also *All W. Electronic, Inc. v M-B-W, Inc.* (1998) 64 CA4th 717, 75 CR2d 509 (failure of contractor, who bought defective paver from equipment dealer, to show privity with manufacturer, or exception to privity requirement, barred warranty cause of action against manufacturer); *In re Air Crash Disaster at Sioux City Iowa on July 19, 1989* (*Banks v United Airlines, Inc.*) (ND Ill 1991) 760 F Supp 1283 (under California law, lack of privity between airplane passenger and manufacturer of hydraulic system defeated breach of warranty claim).

But see *Windham at Carmel Mountain Ranch Ass'n v Superior Court (Presley Cos.)* (2003) 109 CA4th 1162, 1172, 135 CR2d 834 (former CCP §383 provided "common interest development" association requisite privity of contract to sue construction companies for breach of implied warranties; see §6.15).

The former privity requirement in *implied* warranty actions had been greatly relaxed even before adoption of strict product liability. See, *e.g., Peterson v Lamb Rubber Co.* (1960) 54 C2d 339, 347, 5 CR 863, 869 (action by purchaser's employee); *Gottsdanker v Cutter Labs.* (1960) 182 CA2d 602, 606, 6 CR 320, 322 (product for human consumption).

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§11.68 5. Notice of Breach of Warranty

In personal injury and property damage lawsuits, it is not necessary that the plaintiff have given notice of breach of warranty, at least when the action is against a manufacturer or another supplier with whom the plaintiff did not deal directly. *Greenman v Yuba Power Prods., Inc.* (1963) 59 C2d 57, 61, 27 CR 697, 700 (personal injury); *Gherna v Ford Motor Co.* (1966) 246 CA2d 639, 652, 55 CR 94, 103 (property damage).

On the other hand, when the plaintiff seeks damages for a "commercial" or "economic loss, not recoverable under a strict product liability or negligence theory (see §11.24), a breach of warranty claim may fail if Commercial Code notice requirements have not been met. *Fieldstone Co. v Briggs Plumbing Prods., Inc.* (1997) 54 CA4th 357, 369, 62 CR2d 701 (no tort damages recoverable by builder from manufacturer when 1900 sinks began to chip and rust prematurely).

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§11.69 6. Measure of Damages; Agreements Limiting Remedy

Breach of warranty damages may be recovered for the loss, determined in any reasonable manner, that results in the ordinary course of events from the breach. See Com C §2714 (damages for accepted goods), §2715 (incidental and consequential damages); *Seely v White Motor Co.* (1965) 63 C2d 9, 14, 45 CR 17, 20 (refund of purchase price plus loss of profits); *Stott v Johnston* (1951) 36 C2d 864, 870, 229 P2d 348, 352 (loss of goodwill); *Klein v Asgrow Seed Co.* (1966) 246 CA2d 87, 103, 54 CR 609, 620 (loss of value of crop).

Purported contractual limitations on consequential damages for personal injury are prima facie unconscionable. See Com C §§2316(4), 2719. See also Com C §2718(1) (liquidated damages); *Seely v White Motor Co., supra*; *Rose v Chrysler Motors Corp.* (1963) 212 CA2d 755, 763, 28 CR 185, 190.

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C. Defenses

§11.70 1. Disclaimers and Limitations of Warranty

The policy of strictly construing warranty disclaimers against the seller (see *Burr v Sherwin Williams Co.* (1954) 42 C2d 682, 694, 268 P2d 1041, 1048) is retained by the Commercial Code. See Com C §2316; *Hauter v Zogarts* (1975) 14 C3d 104, 118, 120 CR 681. Thus, a purported disclaimer of a statutory warranty is strictly construed against the seller. *John Norton Farms, Inc. v Todagco* (1981) 124 CA3d 149, 172, 177 CR 215, 227 (crop destroyed by herbicide). Strict construction does not apply, however, to a contract clause drawn by or bargained for by the purchaser. See *Southern Cal. Edison Co. v Harnischfeger Corp.* (1981) 120 CA3d 842, 855, 175 CR 67 (contract clause that exculpated manufacturer from liability for implied warranties did not exculpate from liability for strict liability or negligence).

To exclude or modify the implied warranty of merchantability, the disclaimer must mention merchantability and, if written, must be explicit; a disclaimer of the implied warranty of fitness must be in writing and conspicuous. Unless the circumstances indicate otherwise, however, all implied warranties may be disclaimed by wording that plainly conveys that meaning (*e.g.,* "as is" or "with all faults"). Com C §2316(2)-(3)(a). See Com C §2719(3) (invalidity of personal injury disclaimer); *Seely v White Motor Co.* (1965) 63 C2d 9, 18, 45 CR 17, 23 (dictum on "as is" sale); *Holmes Packaging Mach. Corp. v Bingham* (1967) 252 CA2d 862, 875, 60 CR 769, 677 (effective disclaimer in leases).

Express warranties may negate inconsistent implied warranties other than the implied warranty of particular fitness. Com C §2317. See *Gottsdanker v Cutter Labs.* (1960) 182 CA2d 602, 610, 6 CR 320, 325 (no inconsistency).

An *implied* warranty can also be excluded or modified by a course of dealing or performance or usage of trade. Com C §2316(3)(c). But an *express* warranty made on the particular transaction is not negated by a custom of nonwarranty (*India Paint & Lacquer Co. v United Steel Prods. Corp.* (1954) 123 CA2d 597, 613, 267 P2d 408, 419) or by a previous general disclaimer (*Guntert & Zimmerman, Sales Div. v Thermoid Co.* (1963) 216 CA2d 771, 776, 31 CR 99, 102). Nor can a seller validly disclaim express warranties he knows to be false. *Klein v Asgrow Seed Co.* (1966) 246 CA2d 87, 100, 54 CR 609, 618 (applying CC §1668). See Com C §2316(1) (unreasonable disclaimer inoperative).

Attempts to disclaim warranties on or after delivery of the goods, by means of invoice, receipt, or similar notice, are ineffectual unless the buyer assents or is charged with knowledge of nonwarranty in the transaction. *Klein v Asgrow Seed Co.* (1966) 246 CA2d 87, 97, 54 CR 609, 616; *India Paint & Lacquer Co. v United Steel Prods. Corp.* (1954) 123 CA2d 597, 605, 267 P2d 408, 416. Even a disclaimer or limitation in the contract documents is ineffective without proof that it was brought to the buyer's attention. *Hayman v Shoemake* (1962) 203 CA2d 140, 157, 21 CR 519, 531. See *Trane Co. v Gilbert* (1968) 267 CA2d 720, 728, 73 CR 279, 284 (notice of warranty limitation proved).

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§11.71 2. Contributory Negligence; Assumption of Risk

The contributory fault and assumption of risk defenses may now be applied to breach of warranty claims as they are to strict product liability claims (see §§11.42-11.43). See *Daly v General Motors Corp.* (1978) 20 C3d 725, 144 CR 380, holding that comparative fault principles (see §1.41) govern strict product liability actions. Previously, it had been held that in breach of warranty actions contributory negligence was not a defense to a breach of warranty claim (*Vassallo v Sabatte Land Co.* (1963) 212 CA2d 11, 18, 27 CR 814, 818), but that assumption of risk was a defense (*Kassouf v Lee Bros.* (1962) 209 CA2d 568, 572, 26 CR 276).

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§11.72 3. Statute of Limitations

A product liability action for personal injuries must be filed within the time prescribed by the statute applicable to such injuries (CCP §335.1, formerly CCP §340(3)—see §11.41) after the action accrues, even if recovery is sought on a breach of warranty theory. *Becker v Volkswagen of Am., Inc.* (1975) 52 CA3d 794, 125 CR 326 (4-year statute in Com C §2725 inapplicable). See *Atkinson v Elk Corp.* (2006) 142 CA4th 212, 48 CR3d 247 (action on express warranty not subject to 1-year limitations period on merchantability warranties under CC §1791.1; roofing shingles were consumer product under 15 USC §2301); *Carrau v Marvin Lumber & Cedar Co.* (2001) 93 CA4th 281, 292, 112 CR2d 869 (defective windows diminished value of house); *Bennett v Suncloud* (1997) 56 CA4th 91, 97, 65 CR2d 80 (same period applies to product liability, negligence, and breach of warranty causes of action).

The limitations period for a suit alleging breach of warranty resulting in property damage is 4 years from the date the plaintiff suspected or should have suspected that an injury or loss was caused by someone's wrongdoing or, if the damage was caused by a contractor and was patent, from the substantial completion of the construction (see §6.19). See *Mills v Forestex Co.* (2003) 108 CA4th 625, 134 CR2d 273 (plaintiff alleged no facts that would serve as basis for tolling or for estopping defendant from asserting defense).

See Anno, 20 ALR4th 915 (1983) (statute of limitations on personal injury action for breach of UCC implied warranty).

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§11.73 IV. MISREPRESENTATION

Misrepresentation, although akin to breach of express warranty (see §11.66), is a distinct product liability theory. See *Hauter v Zogarts* (1975) 14 C3d 104, 111, 120 CR 681 (golf practice device carton and instruction book said "completely safe[,] ball will not hit player"); *Cooper v Jevne* (1976) 56 CA3d 860, 128 CR 724 (alleged fraudulent conspiracy to conceal defects in condominium construction from purchasers).

The plaintiff must prove that

- the seller made to the public a misrepresentation of a material fact about the character or quality of the product (by advertising, labels, or otherwise);
- the consumer justifiably relied on that misrepresentation; and
- such reliance caused bodily injury or physical harm.

The plaintiff need not establish that the seller made the misrepresentation fraudulently or negligently, or that the consumer bought the product or was in privity of contract with the seller. See Restatement (Second) of Torts §402B (1965). See *Hauter v Zogarts, supra*. Although the plaintiff need not have heard the misrepresentation directly from the defendant (see Restatement §533), the plaintiff still must prove detrimental reliance on it. See *Gawara v United States Brass Corp.* (1998) 63 CA4th 1341, 1351, 74 CR2d 663 (also discussing "fraud on the market" liability).

The principle that bars recovery under a strict product liability theory for emotional distress experienced on learning that one's artificial heart was the type that had a propensity to fracture (see §11.20) does not preclude a cause of action for fraud (no injury would be "caused by the defect" until her particular valve failed). See *Khan v Shiley, Inc.* (1990) 217 CA3d 848, 857, 266 CR 106. But such a claim may be time barred by CCP §338(d). See *Nodine v Shiley, Inc.* (9th Cir 2001) 240 F3d 1149, 1153.

Evidence that the manufacturer of an intrauterine device negligently failed to inform doctors of its risks, and acted in conscious disregard of consumers' rights and safety, is insufficient to establish a cause of action for fraud without evidence that the manufacturer deliberately misrepresented the facts. *Hilliard v A.H. Robins Co.* (1983) 148 CA3d 374, 414, 196 CR 117.

Evidence that a product liability case defendant fraudulently concealed evidence about the defect before settling with a plaintiff may negate settlement agreement provisions that would otherwise have prevented further recovery. See *Fuku-Bonsai, Inc. v E.I. du Pont de Nemours & Co.* (9th Cir 1999) 187 F3d 1031.

Parents of a child who contracted AIDS from a blood transfusion may base a lawsuit against the supplier of the blood on allegations that the supplier negligently misrepresented to them that they could not directly donate blood for the child. *Osborn v Irwin Mem. Blood Bank* (1992) 5 CA4th 234, 7 CR2d 101 (however, supplier may defend by showing that directed donations would not have been feasible because of child's rare blood type). See *N.N.V. v American Ass'n of Blood Banks* (1999) 75 CA4th 1358, 89 CR2d 885 (noted in §9.54; minor contracted AIDS from transfusion; misrepresentation theory apparently not raised; no breach or duty by blood bank or by nurse to whom parents expressed desire that family and friends provide blood).

Print and television advertisements showing people standing and sitting in the cargo beds of stationary pickup trucks do not amount to a misrepresentation that it is safe to ride there unrestrained. *Maneely v General Motors Corp.* (9th Cir 1997) 108 F3d 1176, 1181 (plaintiffs were injured while sleeping under tarp cargo bed when driver fell asleep and ran truck into tree). See *Friedman v Merck & Co.* (2003) 107 CA4th 454, 466, 131 CR2d 885 (manufacturer of TB test containing animal products owed no duty to "strict ethical vegan" who felt emotional distress; no negligent misrepresentation shown).

Suits alleging negligent misrepresentation and fraudulent concealment against a product endorser, such as Underwriters Laboratories, must be brought within statutory limitations periods. See *Platt Elec. Supply, Inc. v EOFF Elec., Inc.* (9th Cir 2008) 522 F3d 1049, 1054 (under CCP §338, 3 years for fraudulent concealment; under CCP §339, 2 years for negligent misrepresentation). See also *Hamilton Materials Inc. v Dow Chem. Corp.* (9th Cir 2007) 494 F3d 1203 (product manufacturer suing asbestos suppliers could not avoid statute of limitations defense by claiming not to have known earlier that suppliers' alleged safety claims were false).

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12

Railroad Crossings

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§12.1 I. SCOPE OF CHAPTER

This chapter covers the liability of railroad companies for injuries to members of the public at railroad crossings.

Liability for injuries to passengers is discussed in chap 5 (Carriers), and liability for injuries on railroad property is covered in chap 10 (Premises Liability). In particular, see §10.3 on the CC §1714.7 limitation on a railroad's liability to a trespasser who is injured while on a moving locomotive or car.

Outside the scope of this book are claims under the Federal Employers' Liability Act, the Locomotive Boiler Inspection Act, and related statutes and cases involving injuries to workers loading or unloading freight cars. See California Workers' Damages Practice §§4.90-4.92 (2d ed Cal CEB 2001). Nor does this chapter discuss nuisance claims against railroad companies alleged to have sought to harass homeowners by excessive whistle blowing and the unnecessary parking of idling locomotives. See *Jones v Union Pac. R.R.* (2000) 79 CA4th 1053, 94 CR2d 661.

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II. BASIC STANDARDS OF CARE

§12.2 A. Reasonable Care Under Circumstances

A railroad company and its train crew must use reasonable care, under the circumstances constituting the probable danger, to avoid injury to anyone traveling on highways crossed by the company's tracks. *Peri v Los Angeles Junction Ry.* (1943) 22 C2d 111, 120, 137 P2d 441, 446; *Romo v Southern Pac. Transp. Co.* (1977) 71 CA3d 909, 916, 139 CR 787; *Rice v Southern Pac. Co.* (1967) 247 CA2d 701, 706, 55 CR 840, 844 (reasonably prudent person). See Anno, 85 ALR2d 267, 275 (1962) (special care in backing trains). See §1.4 on reasonable, *i.e.,* "ordinary" or "due" care.

The duty to use ordinary care extends to both train operation and maintenance of the crossings. *Peri v Los Angeles Junction Ry., supra*.

Whether or not there are circumstances in which a railroad company can be liable for failing to erect a fence to prevent pedestrians from going onto its tracks is a question to be decided by applying principles in *Rowland v Christian* (1968) 69 C2d 108, 70 CR 97 (discussed in §§1.7, 10.3-10.4), and its progeny, to particular facts. *Silva v Union Pac. R.R. Co.* (2000) 85 CA4th 1024, 102 CR2d 668 (record on appeal lacked facts to serve as basis of decision).

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§12.3 B. Willful Misconduct

It is willful misconduct for a railroad company that has actual or constructive knowledge of a peril or danger from which injury is a probable (rather than possible) result to consciously fail to act to avoid the peril. *Morgan v Southern Pac. Transp. Co.* (1974) 37 CA3d 1006, 1012, 112 CR 695 (plaintiff entitled to willful misconduct instruction; crew violated company rules while backing train at night); *Olea v Southern Pac. Co.* (1969) 272 CA2d 261, 77 CR 332 (nature of particular crossing required gates, not mere wigwag signal). See §1.57 on the effect of a willful misconduct finding.

The fact that carelessness in handling a train may wreak far greater havoc than careless handling of, for example, a bicycle, does not change railroad negligence into willful misconduct. See *Donnelly v Southern Pac. Co.* (1941) 18 C2d 863, 869, 118 P2d 465, 468 (inadvertently throwing a switch the wrong way was negligence, not willful misconduct).

Public Utilities Code §2106 (which authorizes punitive damages for utilities' willful violations of statutes and Public Utilities Commission Orders) does not supersede statutory limitations on punitive damages in wrongful death cases. *Vander Lind v Superior Court* (1983) 146 CA3d 358, 364, 194 CR 209 (Amtrak train, exceeding 40-mph speed limit, struck and killed 15-year-old crossing tracks). On punitive damages in wrongful death cases, see California Tort Damages §3.42 (2d ed Cal CEB 2002).

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III. DUTIES IN OPERATING TRAINS

§12.4 A. Reasonable Warning of Approach

Under Pub Util C §7604, a train crew must sound an audible warning device at all rail crossings. Violation of this statute gives rise to a presumption of negligence (see §1.31). *Wilkinson v Southern Pac. Co.* (1964) 224 CA2d 478, 481, 36 CR 689, 691. See *Marquis v St. Louis-San Francisco Ry.* (1965) 234 CA2d 335, 343, 44 CR 367, 371. See also Pub Util C §§7605 (bell ringer), 7607 (headlights). Section 7604 applies to private, as well as public, crossings. See §12.7.

Because the statute sets forth a *minimum* standard, the railroad's compliance with it does not necessarily equal freedom from negligence. *Marquis v St. Louis-San Francisco Ry.* (1965) 234 CA2d 335, 345, 44 CR 367, 373. Due care by the crew includes giving notice of the approaching train by all warnings reasonably necessary under the existing conditions. *Downey v Santa Fe Transp. Co.* (1955) 134 CA2d 720, 727, 286 P2d 40, 46. Such conditions include the motorist's ability to observe the train's approach. *Peri v Los Angeles Junction Ry.* (1943) 22 C2d 111, 121, 137 P2d 441, 447. See Anno, 5 ALR2d 112, 116 (1949) (customary or statutory signal as measure of railroad's duty).

A defendant's duty to warn of dangerous conditions that are not open and obvious does not include a duty to warn that it is dangerous to cross a railroad bridge on a narrow metal grid area when a train is also crossing. See *Christoff v Union Pac. R.R. Co.* (2005) 134 CA4th 118, 36 CR3d 6 (presence of tracks on which trains are constantly run is itself a warning).

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§12.5 B. Regulating Speed

Local ordinances may limit the speed of trains in a city, and an unjustified violation of such an ordinance is negligence as a matter of law (see §1.31). *Whinery v Southern Pac. Co.* (1970) 6 CA3d 126, 128, 85 CR 649. See *Koster v Southern Pac. Co.* (1929) 207 C 753, 765, 279 P 788, 794 (contributory negligence issue remained).

In the absence of an ordinance, the general standard of ordinary care applies to the speed at which a train approaches and passes a crossing. *Rice v Southern Pac. Co.* (1967) 247 CA2d 701, 707, 55 CR 840, 844. A relatively high speed may be justified in sparsely settled areas. *Marquis v St. Louis-San Francisco Ry.* (1965) 234 CA2d 335, 346, 44 CR 367, 373. In more populated areas, however, the railroad must regulate train speed with due regard for the safety of others, considering the location and condition of the crossing. *Peri v Los Angeles Junction Ry.* (1943) 22 C2d 111, 121, 137 P2d 441, 446 (darkness, fog; unlighted train); *Young v Pacific Elec. Ry.* (1929) 208 C 568, 572, 283 P 61, 63 (obstructed view; city crossing); *Herrera v Southern Pac. Co.* (1957) 155 CA2d 781, 786, 318 P2d 784, 787 (same).

Whether the train speed in a populated area was excessive is ordinarily a question of fact. *Stout v Southern Pac. R.R.* (1954) 127 CA2d 491, 502, 274 P2d 194, 201. Excessiveness is a fact question even when crossing protection is provided and the company speed limit is not exceeded. *Herrera v Southern Pac. Co.* (1957) 155 CA2d 781, 787, 318 P2d 784, 788. See also *Morgan v Southern Pac. Transp. Co.* (1974) 37 CA3d 1006, 1013, 112 CR 695 (backing train at 10-12 mph with obstructed view of crossing was willful misconduct).

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§12.6 C. Lookout for Crossing Traffic

The train crew must keep a reasonable lookout for intersecting traffic at places where such traffic should be anticipated and must keep the train under the control reasonably necessary to cope with foreseeable situations. *Herrera v Southern Pac. Co.* (1957) 155 CA2d 781, 785, 318 P2d 784, 787 (duty despite automatic crossing signals).

On the other hand, a crew's failure to stop an engine before it struck an automobile that had stalled on the tracks because of traffic congestion was not such a reckless disregard of the driver's safety as to constitute malice. *Schreefel v Okuly* (1983) 143 CA3d 818, 826, 192 CR 402.

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§12.7 D. Duties at Private Roads and Customary Crossings

A railroad company must use ordinary care in the movement of its trains in the following situations:

- Over private road crossings (*Essick v Union Pac. R.R.* (1960) 182 CA2d 456, 462, 6 CR 208, 212 (lookout); *Stout v Southern Pac. R.R.* (1954) 127 CA2d 491, 274 P2d 194 (speed)), and
- At places where it knows the public customarily crosses the tracks, regardless of the plaintiff's status as a trespasser or licensee on the tracks (*Staggs v Atchison, T. & S.F. Ry.* (1955) 135 CA2d 492, 500, 287 P2d 817, 821 (lookout for children)) or on the adjacent private premises (see *Douglas v Southern Pac. Co.* (1928) 203 C 390, 397, 264 P 237, 239). See *Greene v Atchison, T. & S.F. Ry.* (1953) 120 CA2d 135, 139, 260 P2d 834, 837 (duty stated); *Oettinger v Stewart* (1944) 24 C2d 133, 138, 148 P2d 19, 22 (ordinary care standard). See Annos, 44 ALR2d 680 (1955) (place other than crossing), 167 ALR 1253, 1256 (1947) (private crossing or commonly used footpath)). Note, however, the discussion in §10.3 of the CC §1714.7 limitation on liability to trespassers on locomotives and cars.

Ordinary care may require fencing to protect young children at customary crossings or play areas. *Staggs v Atchison, T. & S.F. Ry.* (1955) 135 CA2d 492, 504, 287 P2d 817, 824.

A statute requiring warning signals, such as Pub Util C §7604 (see §12.4), applies to private road crossings. *Emmolo v Southern Pac. Co.* (1949) 91 CA2d 87, 91, 204 P2d 427, 429. See Pub Util C §7538 (stop signs at farm or private crossing).

A Public Utilities Commission order prohibiting trains from blocking public grade crossings for more than 10 minutes, however, does not create a presumption of negligence toward a pedestrian who was injured while trying to climb over a stopped train's coupling. *Lua v Southern Pac. Trans. Co.* (1992) 6 CA4th 1897, 1902, 9 CR2d 116 (plaintiff's injury did not result from occurrence that order was promulgated to prevent).

A railroad need not have expressly informed any actual or potential train jumpers that train jumping is unlawful and extremely dangerous. *Perez v Southern Pac. Transp. Co.* (1990) 218 CA3d 462, 267 CR 100 (railroad could invoke CC §1714.7 immunity from liability to trespasser; in circumstances, failure to erect barriers to prevent public from crossing tracks is not willful misconduct).

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IV. DUTIES IN MAINTAINING CROSSINGS

§12.8 A. Installing Warning Systems

The railroad company must post signs giving reasonable warning of the presence of its tracks. See *Gregoriev v Northwestern Pac. R.R.* (1928) 95 CA 428, 436, 273 P 76, 82. Failure to place warning lights or barriers at an ordinary railroad crossing may be negligence, but it is not such callous indifference to public safety or disregard of probable harm as to constitute malice. *Schreefel v Okuly* (1983) 143 CA3d 818, 828, 192 CR 402 (crossing became congested with cars when shift changed at nearby plant; punitive damages instruction rejected). But see *Seimon v Southern Pac. Transp. Co.* (1977) 67 CA3d 600, 136 CR 787 (railroad knew of obvious threat posed by dangerous conditions at crossing; punitive damages justified).

Crossing protection ordered by the Public Utilities Commission establishes a minimum standard of care. *Dragash v Western Pac. R.R.* (1958) 161 CA2d 233, 241, 326 P2d 649, 654; *Pennington v Southern Pac. Co.* (1956) 146 CA2d 605, 613, 304 P2d 22, 27; *Jensen v Southern Pac. Co.* (1954) 129 CA2d 67, 72, 276 P2d 703, 707, disapproved on other grounds at 50 C2d 624.

The circumstances may require the company to do more than merely comply with safety statutes or rules. See *Hogue v Southern Pac. Co.* (1969) 1 C3d 253, 258, 81 CR 765 (whether it is negligent to provide signals instead of gates is jury question). That is, the exercise of ordinary care may require the railroad to provide automatic crossing protection or a flagman at crossings that present an unusual hazard, whether or not any regulation so provides. *Hinkle v Southern Pac. Co.* (1939) 12 C2d 691, 701, 87 P2d 349, 354 (heavily traveled road; obstructed view); *Downey v Santa Fe Transp. Co.* (1955) 134 CA2d 720, 726, 286 P2d 40, 45 (obstructed view of train and crossing sign); *Lloyd v Southern Pac. Co.* (1952) 111 CA2d 626, 637, 245 P2d 583, 590 (jury instruction). See Anno, 24 ALR2d 1161, 1169 (1952) (duty to maintain flagman).

A state law damages suit alleging the inadequacy of warning signs is precluded if there were warning signs installed with federal funds that conformed to the requirements of the Federal Railroad Safety Act (FRSA) (49 USC §§20101-20153) and Federal Highway Administration regulations. *Norfolk S. Ry. Co. v Shanklin* (2000) 529 US 344, 146 L Ed 2d 374, 120 S Ct 1467. For more on FRSA preemption, see *Southern Cal. Regional R.R. Auth. v Superior Court (Tutino)* (2008) 163 CA4th 712, 77 CR3d 765 (49 USC §20106(a)(2) supports federal preemption of state law negligence claims based on operating commuter train in "push mode").

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§12.9 B. Designing, Maintaining, and Operating Crossing Protection

A railroad company must use due care in the design, construction, operation, and maintenance of its signal and protective systems. *Hogue v Southern Pac. Co.* (1969) 1 C3d 253, 258, 81 CR 765 (signal not conspicuous); *Wilcox v Southern Pac. Co.* (1961) 190 CA2d 548, 550, 12 CR 207, 208 (same); *Startup v Pacific Elec. Ry.* (1947) 29 C2d 866, 869, 180 P2d 896, 898 (design defective when two trains approaching); *Will v Southern Pac. Co.* (1941) 18 C2d 468, 473, 116 P2d 44, 47 (wigwag signal not operating). See *Vasquez v North County Transit Dist.* (9th Cir 2002) 292 F3d 1049, 1055 (railroad liability when, because of faulty bolts, raised railroad crossing gate fell and struck police officer; firefighter's rule defense ruled inapplicable; see §1.55; *Rice v Southern Pac. Co.* (1967) 247 CA2d 701, 708, 55 CR 840, 846 (signals operated when no train approached); *Wyseur v Davis* (1922) 58 CA 598, 601, 209 P 213, 214 (crossing gates inoperative). For signal or protective system specifications, see, *e.g.,* Public Utility Commission General Order 75C. See Anno, 90 ALR2d 350, 354 (1963) (failure of signal device).

On a public entity's duties in maintaining streets and sidewalks adjacent to railroad tracks, see *Durham v City of Los Angeles* (1979) 91 CA3d 567, 575, 154 CR 243. See Anno, 22 ALR4th 624 (1983) (government liability for permitting foliage to obscure view at railroad crossing). See generally §§8.18-8.25.

On a related matter, see Anno, 66 ALR4th 885 (1988) (private landowner's liability for vegetation obscuring view at crossing).

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V. DEFENSES

§12.10 A. Contributory Negligence

The contributory fault of the motorist or other person for whose injuries a railroad company is sued effects a proportional reduction of plaintiff's damages. See §1.41.

Even before California adopted the comparative fault system, the contributory negligence of the injured person did not bar recovery if

- the train crew was guilty of willful misconduct in failing to take effective action to avoid the accident after discovering plaintiff's peril (*Harrington v Los Angeles Ry.* (1903) 140 C 514, 522, 74 P 15, 18; *Esrey v Southern Pac. Co.* (1894) 103 C 541, 544, 37 P 500, 501); or
- the railroad willfully or wantonly failed to protect the public at hazardous crossings (*Olea v Southern Pac. Co.* (1969) 272 CA2d 261, 265, 77 CR 332, 335 (willful failure to provide crossing gates); see *Givens v Southern Pac. Co.* (1961) 194 CA2d 39, 45, 14 CR 736, 740 (willful misconduct not shown); see also Anno, 70 ALR2d 9 (1960) (last clear chance)).

On the present effect of a defendant's willful misconduct, see §§1.57-1.61. On contributory fault in lawsuits brought under the Federal Employers' Liability Act (FELA) (45 USC §§51-60), see *Norfolk S. Ry. Co. v Sorrell* (2007) 549 US 158, 166 L Ed 2d 638, 127 S Ct 799 (error to instruct jury that standard applied to contributory negligence of injured worker differed from that applied to defendant; lower courts applied Missouri law), and §1.42.

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§12.11 1. Duty to Stop, Look, and Listen (Modified Rule)

A driver approaching a railroad crossing is required to look and listen with care but, except when required by statute (*e.g.,* Veh C §22450 (stop sign), §22451 (signal device)), is not necessarily required to stop (*i.e.,* a rigid stop, look, and listen rule no longer applies). The essential test is whether the driver used reasonable care to discover the train's approach. *Lucas v Southern Pac. Co.* (1971) 19 CA3d 124, 137, 96 CR 356, 363 (rejecting prior appellate statements on duty to look, listen, or stop). See also *Marquis v St. Louis-San Francisco Ry.* (1965) 234 CA2d 335, 348, 44 CR 367, 374; *Anello v Southern Pac. Co.* (1959) 174 CA2d 317, 320, 344 P2d 843, 845; *Green v Key Sys. Transit Lines* (1953) 116 CA2d 512, 519, 253 P2d 780, 784.

However, contributory negligence may be found as a matter of fact (*Wilkinson v Southern Pac. Co.* (1964) 224 CA2d 478, 489, 36 CR 689, 696) or as a matter of law (*Aguilera v Atchison, T. & S.F. Ry.* (1961) 188 CA2d 274, 279, 10 CR 367, 370) if the driver proceeds into the path of a plainly visible train at an unobstructed crossing without legal excuse, or fails to slow down at an obstructed crossing (Veh C §22352(a)(1)(A); see *Koster v Southern Pac. Co.* (1929) 207 C 753, 765, 279 P 788, 793). But see *Lucas v Southern Pac. Co., supra*.

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§12.12 2. Disregarding or Relying on Crossing Signal, Gate, Flagman, or Warning

Disregard of an automatic signal device, crossing gate, flagman, or audible warning by a driver or pedestrian gives rise to a presumption of negligence. Veh C §22451; *Rice v Southern Pac. Co.* (1967) 247 CA2d 701, 710, 55 CR 840, 847. See §1.31 on such presumptions. The presumption may be rebutted, however, by evidence that

- the signal was not clearly visible (*Rice v Southern Pac. Co.* (1967) 247 CA2d 701, 711, 55 CR 840, 847; see *Hogue v Southern Pac. Co.* (1969) 1 C3d 253, 259, 81 CR 765, 768 (signal not conspicuous plus other factors)); or
- the driver reasonably believed that the signal was activated by a stopped train (*Coe v Southern Pac. Co.* (1962) 203 CA2d 509, 518, 21 CR 731, 737; see *Grimes v Southern Pac. Co.* (1966) 243 CA2d 304, 315, 52 CR 60, 67 (signals remained operating during switching)).

A motorist must still take precautions when approaching a crossing where customarily provided protection is not in operation, but is not required to exercise the same amount of care as would otherwise be necessary. *Spendlove v Pacific Elec. Ry.* (1947) 30 C2d 632, 634, 184 P2d 873, 874 (wigwag signal stopped); *Toschi v Christian* (1944) 24 C2d 354, 360, 149 P2d 848, 851 (absence of customary flagman); *Will v Southern Pac. Co.* (1941) 18 C2d 468, 474, 116 P2d 44, 47 (wigwag signal not operating); *Lucas v Southern Pac. Co.* (1971) 19 CA3d 124, 139, 96 CR 356 (same). However, the driver must have reasonably relied on an appearance of safety. See *Koster v Southern Pac. Co.* (1929) 207 C 753, 768, 279 P 788, 794 (driver knew that watchman was not on duty); *Balding v Atchison, T. & S.F. Ry.* (1964) 225 CA2d 254, 260, 37 CR 215, 218 (driver did not know what signals were supposed to guard crossing).

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§12.13 3. Vehicle Passengers' Negligence

A driver's negligence is not imputed to a passenger unless it is shown that the passenger had the right to control the vehicle. *Campagna v Market St. Ry.* (1944) 24 C2d 304, 307, 149 P2d 281, 283; *Peri v Los Angeles Junction Ry.* (1943) 22 C2d 111, 127, 137 P2d 441, 449. See *Marquis v St. Louis-San Francisco Ry.* (1965) 234 CA2d 335, 351, 44 CR 367, 376 (driver's negligence not imputable to wife).

However, a rider must use ordinary care for his own safety, which may include warning the driver of an approaching train. *Pobor v Western Pac. R.R.* (1961) 55 C2d 314, 324, 11 CR 106, 111; *Coe v Southern Pac. Co.* (1962) 203 CA2d 509, 520, 21 CR 731, 738. The rider is not, however, held to the same standards of observation as the driver. *Wagner v Atchison, T. & S.F. Ry.* (1930) 210 C 526, 528, 292 P 645, 646.

In the absence of notice to the contrary (see *Travis v Southern Pac. Co.* (1962) 210 CA2d 410, 422, 26 CR 700, 706 (riding with known reckless driver)), a rider may assume that the driver will take proper precautions (*Marchetti v Southern Pac. Co.* (1928) 204 C 679, 682, 269 P 529, 531).

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§12.14 B. Assumption of Risk

At present, the situation would be rare in which a person injured while crossing railroad tracks would be completely barred from recovering by the *primary* assumption of risk doctrine. See discussion in §§1.46-1.55. Driving through a warning signal, or "racing" a train to the crossing, for example, would usually be a form of contributory fault that proportionally reduces damages, but does not necessarily preclude recovery.

Conduct of the person injured in a railroad crossing accident that was formerly characterized as assumption of risk, but would now be viewed as a form of contributory negligence, is discussed in such cases as *Rogers v Los Angeles Transit Lines* (1955) 45 C2d 414, 418, 289 P2d 226, 228, and *Travis v Southern Pac. Co.* (1962) 210 CA2d 410, 435, 26 CR 700, 714 (riding with known reckless driver). See also Annos, 63 ALR2d 1226 (1959) (walking or standing beside track), 27 ALR2d 369 (1953) (climbing between cars).

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Pharmaceuticals and Medical Devices

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I. STRICT PRODUCT LIABILITY

§13.1 A. Elements

The elements of a strict product liability claim alleging the marketing of a defective prescription drug or medical device are generally the same as for other defective products, with certain exceptions. As in other product liability claims, a plaintiff must allege that he or she was harmed by a product distributed, manufactured, supplied, or sold by the defendant and that it was defectively designed, contained a manufacturing defect, or did not include sufficient instructions or warning of potential safety hazards. See *Greenman v Yuba Power Prods., Inc*. (1963) 59 C2d 57, 62, 27 CR 697; CACI 1200. See also §§11.1-11.6.

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§13.2 1. No Strict Liability for Design Defects

Unlike other product liability claims, a strict liability claim cannot be alleged for design defects in prescription drugs or medical devices. *Brown v Superior Court* (1988) 44 C3d 1049, 1061, 245 CR 412 (prescription drugs); *Artiglio v Superior Court* (1994) 22 CA4th 1388, 1395, 27 CR2d 589 (breast implant); *Hufft v Horowitz* (1992) 4 CA4th 8, 11, 5 CR2d 377 (penile implants). See §402A, Restatement Second of Torts, comment k. See *Armstrong v Optical Radiation Corp.* (1996) 50 CA4th 580, 57 CR2d 763 (intraocular lens; no design defect liability, but no preemption of manufacturing defect, strict liability, negligence, or breach of warranty claims). See also *Scott v CIBA Vision Corp*. (1995) 38 CA4th 307, 44 CR2d 902 (contact lens cleaning product); *Morris v Parke, Davis & Co.* (CD Cal 1987) 667 F Supp 1332 (no preemption by federal vaccine injury statute).

Nonprescription (*i.e.,* over the counter) drugs and nonprescription medical devices (*e.g.,* latex gloves) are subject to strict liability based on design defect. See *Morson v Superior Court (Medline Indus., Inc.)* (2001) 90 CA4th 775, 790, 109 CR2d 343. See also §§11.8-11.13.

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Source: Torts/California Tort Guide/13 Pharmaceuticals and Medical Devices/§13.3 2. Manufacturing Defects

§13.3 2. Manufacturing Defects

To establish liability based on allegations that a prescription drug or medical device was defectively manufactured, a plaintiff must plead and prove the following (CACI 1201):

- The product contained the manufacturing defect when it left the defendant's possession;
- The product was used in a way that was reasonably foreseeable to the defendant; and
- The product's defect was a substantial factor in causing harm to the plaintiff.

A product contains a manufacturing defect if it differs from the manufacturer's design or specifications or from other typical units of the same product line. *In re Coordinated Latex Glove Litig*. (2002) 99 CA4th 594, 605, 121 CR2d 301 (allergic reaction to latex gloves; no manufacturing defect claim when gloves did not vary from design). In other words, if the product was made as it was designed to be made, liability cannot be imposed for an alleged manufacturing defect even if the product caused injury. 99 CA4th at 605.

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3. Duty to Warn

§13.4 a. Elements

Manufacturers of prescription drugs or medical devices have a duty to warn of known or reasonably scientifically knowable risks. *Carlin v Superior Court (Upjohn Co.)* (1996) 13 C4th 1104, 1110, 56 CR2d 162. To prevail on a claim based on the duty to warn, a plaintiff must establish the following (CACI 1205):

- The risk presented a substantial danger to users of the product;
- Ordinary consumers would not have recognized the potential risk;
- The product was used in a foreseeable manner; and
- The lack of a sufficient warning or instruction was a substantial factor in causing plaintiff's harm.

In establishing whether a risk was known or knowable, evidence of the state of the art is admissible. See §11.17.

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§13.5 b. Learned-Intermediary Rule

Under the learned-intermediary rule, a manufacturer's or supplier's duty to warn runs to the physician to whom the product is supplied, not to the patient. *Carlin v Superior Court (Upjohn Co.)* (1996) 13 C4th 1104, 1116, 56 CR2d 162. See *Brown v Superior Court* (1988) 44 C3d 1049, 1061, 245 CR 412; *Magee v Wyeth Labs., Inc.* (1963) 214 CA2d 340, 350, 29 CR 322.

An adequate warning to doctors of the potential dangers of a prescription drug or medical device negates any duty to ensure that the warning reaches the patient for whom the product is prescribed. *Stevens v Parke, Davis & Co.* (1973) 9 C3d 51, 65, 107 CR 45. There is an exception to this rule if a prescription drug was administered as part of a mass immunization program (*e.g.,* polio vaccine). *Davis v Wyeth Labs., Inc.* (9th Cir 1968) 399 F2d 121, 131.

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§13.6 c. No Duty to Warn of Dangers Obvious or Known to Medical Community

Because the defendant's duty to warn runs to the physician, the defendant is not required to warn of a risk already known to the medical community. *Carlin v Superior Court (Upjohn Co.)* (1996) 13 C4th 1104, 1116, 56 CR2d 162; *Plenger v Alza Corp*. (1992) 11 CA4th 349, 362, 13 CR2d 811 (learned-intermediary doctrine applies to intrauterine device; risk of death from untreated infection was matter of general medical knowledge).

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Source: Torts/California Tort Guide/13 Pharmaceuticals and Medical Devices/§13.7 d. Exception for Nonprescription Drugs

§13.7 d. Exception for Nonprescription Drugs

Because nonprescription drugs or medical devices are not required to be sold through a physician, the company selling nonprescription products owes a duty directly to the consumer to warn of risks. *Plummer v Lederle Labs.* (2d Cir 1987) 819 F2d 349, 356 (applying California law). Moreover, the learned-intermediary rule does not apply, even if a physician prescribed a drug or device that did not require a prescription. *Prager v Allergan, Inc.* (ND Ill, July 19, 1990, No. 89-C-6721) 1990 US Dist Lexis 8986 (applying Illinois law).

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Source: Torts/California Tort Guide/13 Pharmaceuticals and Medical Devices/§13.8 e. Off-Label Use

§13.8 e. Off-Label Use

Off-label use means the use of a product approved by the Food and Drug Administration (FDA) in a way or for a purpose other than stated on the label. Physicians are permitted to prescribe off-label use of FDA-approved products. 21 USC §396 (FDA cannot limit or interfere with health care practitioner's authority to prescribe or administer any legally marketed device for any condition); *Buckman Co. v Plaintiffs' Legal Comm*. (2001) 531 US 341, 350, 148 L Ed 2d 854, 862, 121 S Ct 1012. The pharmaceutical and medical device industries are prohibited from promoting off-label use (21 USC §§360aaa(b), 360aaa-6; 21 CFR §99), but they may provide information about off-label use to physicians (21 USC §360aaa-6(a); 21 CFR §99.1(b)).

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§13.9 4. Product Used In Foreseeable Manner

It is the plaintiff's burden to prove that the product was used in a foreseeable manner. *Romito v Red Plastic Co*. (1995) 38 CA4th 59, 69, 44 CR2d 834. See §11.3. Product misuse must be pleaded as an affirmative defense. *Williams v Beechnut Nutrition Corp*. (1986) 185 CA3d 135, 141, 229 CR 605. See CACI 1205. Misuse is not a defense if it was foreseeable to the defendant. *Campbell v Southern Pac. Co*. (1978) 22 C3d 51, 56, 148 CR 596. See generally §11.42. The misuse must be the cause of the injury. *Huynh v Ingersoll-Rand* (1993) 16 CA4th 825, 831, 20 CR2d 296. See §11.3.

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B. Proving Causation

§13.10 1. Expert Testimony

Because of the complexity of drugs and medical devices, as well as the complexity of the human body, expert testimony is usually required to prove both general and specific causation. *Morson v Superior Court (Medline Indus., Inc.)* (2001) 90 CA4th 775, 779, 109 CR2d 343 (latex gloves); *Stilwell v Smith & Nephew, Inc.* (9th Cir 2007) 482 F3d 1187 (orthopedic implant). See *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 974, 25 CR2d 550 (medical monitoring claims).

NOTE: General causation establishes whether the drug or device can cause the injury. Specific causation establishes whether the drug or device caused the injury to the specific plaintiff. As in other product liability cases, damages cannot be recovered under either a strict product liability theory or a negligence theory unless a defect in the product has caused actual personal injury or property damage. *Khan v Shiley, Inc.* (1990) 217 CA3d 848, 266 CR 106 (summary judgment against patient who suffered emotional distress on being told that her artificial heart was type that had propensity to fracture; no injury would be "caused by the defect" until her particular valve failed). The plaintiff's evidence need afford only a reasonable basis for concluding that it is more likely than not that the defect caused injury; conclusive proof or proof beyond a reasonable doubt is not required. *Grinnell v Charles Pfizer & Co.* (1969) 274 CA2d 424, 435, 79 CR 369, 374. See, generally, §11.20.

Causation must be proved within a reasonable medical probability, and on the basis of expert testimony that the defective drug or device was a substantial factor in causing the injury. *Jones v Ortho Pharm. Corp.* (1985) 163 CA3d 396, 402, 209 CR 456 (testimony insufficient to prove contraceptive drug caused cervical cancer); *Daubert v Merrell Dow Pharm., Inc.* (9th Cir 1995) 43 F3d 1311 (Bendectin; plaintiffs must show that drug more likely than not caused their injuries, not merely that it increased likelihood of injury). See §11.20.

In prescription drug cases, evidence of Food and Drug Administration (FDA) approval of other drugs containing the ingredient alleged to have caused the injury is admissible. *O'Neill v Novartis Consumer Health, Inc.* (2007) 147 CA4th 1388, 1396, 55 CR3d 551.

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§13.11 2. Causation Must Be Proven Through The Physician

Plaintiff must prove that the lack of a sufficient warning or instruction was a substantial factor in causing plaintiff's harm. See §§1.13, 11.20. Because the physician has the duty to warn or instruct, plaintiff must prove that the physician would have acted differently (*i.e.*, would not have prescribed the drug or device) if the appropriate warning had been given. See *Motus v Pfizer, Inc.* (9th Cir 2004) 358 F3d 659 (plaintiff failed to prove that physician would not have prescribed Zoloft had warning been given).

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§13.12 3. Res Ipsa Loquitur

Like other types of product liability claims, claims alleging defective prescription drugs or medical devices can go to the jury with instructions based on res ipsa loquitur. See Evid C §646(c); CACI 417. In prescription drug and medical device claims, the issue is whether the "harm ordinarily would not have happened unless someone was negligent." Comment to Evid C §646(c); CACI 417. See §11.55; see generally §§1.32-1.37.

For practical purposes, the doctrine of res ipsa loquitur rarely applies to prescription drug and medical device claims, because drugs and medical devices are complex products that can fail for a variety of reasons (*e.g.,* medical complications, body rejection phenomena, allergic reaction, surgical techniques). See, *e.g., Clark v Medtronic*, *Inc.* (D Minn 2008) 572 F Supp 2d 1090, 1094 (res ipsa loquitur not applicable to failed implantable cardioverter defibrillator); *Mozes v Medtronic, Inc*. (D Minn 1998) 14 F Supp 2d 1124, 1129 (res ipsa loquitur not applicable to failed pacemaker).

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C. Damages

§13.13 1. Medical Monitoring

Damages for medical monitoring are recoverable. *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 974, 25 CR2d 550. Medical monitoring damages are the cost of future medical monitoring to detect the onset of a disease (*e.g.,* cancer) and are compensable if (1) the need for future monitoring is a reasonably certain consequence of the plaintiff's toxic exposure and (2) the recommended monitoring is reasonable. 6 C4th at 974. Plaintiff must prove that defendant exposed plaintiff to a reasonably certain risk of a disease that should be monitored and that the monitoring is reasonable, both in cost and benefit. 6 C4th at 974. Expert testimony is necessary to establish the damages. 6 C4th at 974. See generally §11.23 and California Tort Damages §1.22 (2d ed Cal CEB 2002).

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§13.14 2. Fear of Developing Cancer or Other Serious Illness

Damages for emotional distress from the fear of developing cancer or another serious physical illness can be recovered, even in the absence of a present physical injury or illness. *Potter v Firestone Tire & Rubber Co.* (1993) 6 C4th 965, 974, 25 CR2d 550. In a negligence action, damages for fear of cancer can be recovered if the plaintiff can plead and prove that the fear stems from knowledge, corroborated by reliable medical and scientific opinion, that there is a greater than 50-percent chance that the feared cancer will develop in the future because of the toxic exposure. 6 C4th at 974. Expert testimony on the issue is necessary. 6 C4th at 974. See generally California Tort Damages §1.87 (2d ed Cal CEB 2002).

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§13.15 D. Persons Who May Be Liable

The law governing those who may be liable in prescription drug and medical device cases is not significantly different from other product liability cases. Strict product liability does not, however, apply to physicians, hospitals, pharmacies, and dentists. See §§13.16-13.19. As in other product claims, any person or entity in the chain of distribution is liable, including manufacturers, distributors, and retailers. See §§11.29-11.34.

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§13.16 1. Physicians Not Liable

Physicians are not strictly liable for products they prescribe or use to treat patients. *Carmichael v Reitz* (1971) 17 CA3d 958, 979, 95 CR 381 (strict liability does not apply to doctor who prescribed defective drug). The *Carmichael* court reasoned that the true suppliers or distributors of drugs are "mere conduits" engaged in the business of selling the product; that a prescribing physician is not in the business of selling drugs or devices; that these products are simply ancillary to medical treatment; and that a physician is selling services as a healer, with skill and judgment derived from specialized training, knowledge, and experience. 17 CA3d at 979.

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§13.17 2. Dentists Not Liable

Dentists are not strictly liable for products they prescribe or use to treat patients. Dentists, like doctors, are not in the business of selling drugs or devices, and their services do not depend on the sale of a product. *Murphy v E.R. Squibb & Sons, Inc*. (1985) 40 C3d 672, 679, 221 CR 447.

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§13.18 3. Hospitals Not Liable

Hospitals are not strictly liable for products they prescribe or use to treat patients. *Silverhart v Mount Zion Hosp*. (1971) 20 CA3d 1022, 1028, 98 CR 187 (defective surgical needle broke during operation). In *Silverhart,* the court held that hospitals are like physicians in that they are not in the business of selling drugs or devices; these products are simply ancillary to medical treatment. 20 CA3d at 1027. The relationship between a hospital and its patients is based on the professional services that it provides. 20 CA3d at 1027. The court noted that this exception to strict liability does not apply when the hospital is engaged in activities not integrally related to its primary function of providing medical services (*e.g.,* when hospital gift shop sells defective products). 20 CA3d at 1027 n4. See *San Diego Hosp. Ass'n v Superior Court (Coombe)* (1994) 30 CA4th 8, 16, 35 CR2d 489 (no strict liability for defective laser that injured physician performing procedure); *Hector v Cedars-Sinai Med. Ctr.* (1986) 180 CA3d 493, 500, 225 CR 595 (no strict liability for defective pacemaker); *Shepard v Alexian Bros. Hosp*. (1973) 33 CA3d 606, 611, 109 CR 132 (no strict liability for defective blood transfusions).

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§13.19 4. Pharmacy Not Liable

In *Murphy v E.R. Squibb & Sons, Inc*. (1985) 40 C3d 672, 221 CR 447, the California Supreme Court held that a pharmacy may not be strictly liable for dispensing a prescription drug. Although pharmacies differ from hospitals and physicians in that they may be in the business of selling drugs, public policy favors giving pharmacies immunity from strict liability. 40 C3d at 677.

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II. NEGLIGENCE

§13.20 A. Negligent Design

Although plaintiffs cannot claim strict liability against manufacturers of prescription drugs or medical devices for defective design, plaintiffs can still pursue negligence claims, alleging design defect. *Brown v Superior Court* (1988) 44 C3d 1049, 1061, 245 CR 412. Neither the "consumer expectations test" nor the "safer alternative design" test should be applied to prove the defendant's negligence. 44 C3d at 1065. Instead, CACI 1221, which describes the standard of care for all product liability negligence claims, requires a balancing of what defendant knew or should have known about the likelihood and severity of potential harm from the product against the burden of taking safety measures to reduce or avoid the harm.

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§13.21 B. Negligent Manufacturing Claims

A claim asserting negligent manufacture of a prescription drug or medical device must prove not only that the manufacturer failed to use reasonable care in producing the product, but that the product was defective under the definition of a manufacturing defect and that the product differed from the manufacturer's intended result or had materially significant differences among identical units from the same product line. *In re Coordinated Latex Glove Litig.* (2002) 99 CA4th 594, 613, 121 CR2d 301.

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§13.22 C. Claims for Negligent Failure to Warn

A claim asserting a negligent failure to warn of the dangers of a prescription drug or medical device must allege that the defendant did not use reasonable care to warn or instruct plaintiff's physician about the product's dangerous condition or about facts that make the product likely to be dangerous. *Carlin v Superior Court (Upjohn Co.)* (1996) 13 C4th 1104, 1112, 56 CR2d 162; CACI 1222. See §11.52. In a failure-to-warn case, unlike a strict liability case, a plaintiff is required to prove that a manufacturer or distributor did not warn of a particular risk for reasons that fell below the acceptable standard of care, *i.e.,* what a reasonably prudent manufacturer would have known and warned about. *Carlin,* 13 C4th at 1112. See §11.52. Issues of reasonableness of conduct and foreseeability of harm in a case are often determinative. See *Friedman v Merck & Co.* (2003) 107 CA4th 454, 466, 131 CR2d 885 (no duty to vegan to warn of animal products in vaccine). See also *Magee v Wyeth Labs., Inc.* (1963) 214 CA2d 340, 350, 29 CR 322 (drug manufacturer's warning to physicians sufficient).

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§13.23 D. Postsale Duty to Warn or Recall

A manufacturer, distributor, or seller has a postsale duty to warn the consumer of risks that the manufacturer becomes aware of. Plaintiff must prove that after the sale the defendant knew or should have known that the product was dangerous or was likely to be dangerous when used in a reasonably foreseeable manner, and that under the circumstances a reasonable manufacturer, seller, or distributor would have recalled the product. See CACI 1223; *Lunghi v Clark Equip. Co*. (1984) 153 CA3d 485, 200 CR 387 (manufacturer had duty to warn of danger and conduct retrofit campaign). See also §§11.47, 11.52.

NOTE: Defendants often argue that a failure-to-recall claim is preempted, citing federal decisions from states that do not recognize the duty to recall. Because California law recognizes claims for failure to recall a defective product, these claims are parallel to federal requirements regarding recall and are not preempted by federal law.

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E. Presumptions of Negligence (Negligence Per Se)

§13.24 1. Based on Violation of Statute or Regulation

"Negligence per se" refers to the concept that a defendant proved to have violated a statute or regulation is rebuttably presumed to be negligent; the statute or regulation establishes a particular duty of care. Evid C §669. See §§1.28, 1.31. Negligence per se does not create a new cause of action, but if an underlying cause of action exists, a statute or regulation can establish the standard of care. That is, courts adopt the requirements of a statute or a regulation as the standard for the conduct of a reasonable person (Restatement (2d) of Torts (1965) §286) and presume that a violation of the statute or regulation is negligence.

To determine whether a statute or regulation applies in a negligence per se claim, the court must decide whether the injury resulted from an act that the statute was designed to prevent and whether the person suffering the injury was one of the class of persons for whose protection the statute was adopted. Evid C §669; *DiRosa v Showa Denko K. K.* (1996) 44 CA4th 799, 806, 52 CR2d 128 (applying FDA regulation; contaminated L-Tryptophan violated FDA regulation). For claims alleging defective prescription drugs and medical devices, FDA regulations may be adopted as the standard of care in a negligence action. 44 CA4th at 808. See *Steele v Collagen Corp.* (1997) 54 CA4th 1474, 63 CR2d 879 (collagen implants alleged to have violated FDA requirements, causing autoimmune disorder).

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§13.25 2. *Buckman* Preemption of Negligence Per Se Claims

Defendants often argue that negligence per se claims in prescription drug and medical device suits are preempted under *Buckman Co. v Plaintiffs' Legal Comm*. (2001) 531 US 341, 148 L Ed 2d 854, 121 S Ct 1012. In *Buckman,* the Supreme Court held that there is no private right of action for violation of Food and Drug Administration (FDA) regulations. 531 US at 350. The Court held that the claims concerning fraud on the FDA exist solely by virtue of the disclosure requirements of the Food, Drug, and Cosmetic Act (FDCA) (21 USC §§301-399a). 531 US at 353. Negligence per se claims based on violations of FDA regulations also exist solely by virtue of the FDCA disclosure requirements and could be preempted.

Plaintiffs in such cases will often argue that negligence per se claims are merely ordinary negligence claims in which the standard of care is established by a statute or regulation. See §13.24. As explained in *Buckman,* these claims exist independently, not "solely by virtue of the FDCA disclosure requirements." 531 US at 353. In *Buckman,* the court distinguished claims of fraud on the agency from actions based on traditional state tort law principles of the duty of care, which have been reserved to the states. 531 US at 352. See *Bates v Dow Agrosciences LLC* (2005) 544 US 431, 449, 161 L Ed 2d 687, 125 S Ct 1788.

PRACTICE TIP: It appears that in California the better argument is that negligence per se claims are not preempted. It should be noted that although in *DiRosa v Showa Denko K. K.* (1996) 44 CA4th 799, 808, 52 CR2d 128, the court adopted FDA regulations as the standard of care, *DiRosa* is a pre-*Buckman* decision and did not consider preemption principles.

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§13.26 III. COORDINATION IN MASS TORT LITIGATION

Mass torts involve multiple claims arising from a single product. Mass tort coordination issues often come up in the context of claims alleging defective drugs or devices because defective drugs or devices often cause numerous injuries that arise out of common facts that can be proved by common evidence and witnesses. Both California and federal law favor the pretrial coordination of these cases in a single forum. See 28 USC 1407; Cal Rules of Ct 3.501-3.506. The purposes of California coordinated proceedings and federal multidistrict litigation proceedings are to promote judicial economy and to eliminate the potential for conflicting contemporaneous pretrial rulings by coordinate district courts.

PRACTICE TIP: Both plaintiffs and defendants save enormous resources in having discovery and pretrial matters coordinated in a single, or a few, venues. There, are, however, potential disadvantages for each party. For defendants, coordination may raise the quality of opposing counsel. Instead of facing one small opposing law firm, the defendant now faces many, who can organize to share work and who may be as well financed as the defendant. For plaintiffs, there is a potential disadvantage in losing control to a plaintiffs' steering committee on strategic decisions.

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§13.27 IV. FEDERAL PREEMPTION

The biggest distinction between prescription drug and medical device litigation and litigation of other product liability claims is the potential defense of federal preemption. Because of the extensive federal regulations governing prescription drugs and medical devices, this defense is common and when successful essentially grants defendants immunity from liability. Prescription drugs and medical devices have separate regulatory frameworks, and preemption in medical device cases is different from preemption in prescription drug cases.

Under US Const art VI, cl 2 (the Supremacy Clause), any state law conflicting with the exercise of enumerated federal powers is preempted. The federal preemption of state law can occur in three types of situations: (1) Congress explicitly preempts state law ("express preemption"), (2) preemption is implied because Congress has occupied the entire field ("field preemption"), and (3) preemption is implied because there is an actual conflict between federal and state law ("conflict preemption"). See §1.44. Express preemption and implied conflict preemption may be invoked as defenses to pharmaceutical and medical device claims.

California state courts recognize and apply these same basic principles. See*, e.g., Dowhal v SmithKline Beecham Consumer Healthcare* (2004) 32 C4th 910, 923, 12 CR3d 262.

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§13.28 A. The Food, Drug, and Cosmetic Act and the Medical Device Amendments

Before 1976, the federal government did not regulate the entry of medical devices into the market, but in response to the injuries associated with the Dalkon Shield intrauterine device and other devices, Congress enacted the Medical Device Amendments (MDA) (21 USC §§360c-360n) to the Food, Drug, and Cosmetic Act (FDCA) (21 USC §§301-399a). The MDA gave the Food and Drug Administration (FDA) the authority to regulate medical devices before and after they enter the market. See *Medtronic, Inc. v Lohr* (1996) 518 US 470, 476, 135 L Ed 2d 700, 710, 116 S Ct 2240. See also *Papike v Tambrands, Inc.* (9th Cir 1997) 107 F3d 737 (device-specific (tampons), disease-specific (toxic shock syndrome) regulations preempted cause of action for failure to warn of risk.)

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§13.29 1. Three Classes of Medical Devices

Under the MDA, different types of medical devices receive different levels of scrutiny. 21 USC §360c(a)(1)(C). All medical devices are divided into three classifications, depending on the potential of the device to cause injury or illness. See *Medtronic, Inc. v Lohr* (1996) 518 US 470, 476, 135 L Ed 2d 700, 710, 116 S Ct 2240. For each classification, the MDA provides an increasing level of regulatory oversight. Class I devices (*e.g.,* tongue depressors) are subject only to general controls designed to ensure that labeling is accurate and that the product is safe when used as directed. Class II devices (*e.g.,* tampons) are subject to tighter controls, such as federal performance regulations. Class III devices (*e.g.,* pacemakers and heart valves) are subject to the most stringent regulations. For example, a manufacturer may not market a Class III medical device until after the Food and Drug Administration (FDA) grants premarket approval (PMA), which occurs only if the manufacturer provides the FDA with "reasonable assurance" that the device is both safe and effective. 21 USC §360e(d)(2)(A)-(B). A manufacturer demonstrates the safety and efficacy of a device through a series of steps, described in 21 USC §360e(c), known as the PMA process.

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§13.30 2. Exception to Premarket Approval of Class III Devices

When Congress enacted the MDA, the Food and Drug Administration (FDA) did not have the resources to process premarket approval (PMA) applications for all of the Class III devices already on the market. Consequently, Congress created an exception that any device on the market on or before May 26, 1976, is not subject to the PMA requirement. In addition, a new Class III device is not subject to the PMA requirement if the manufacturer can establish that the device is "substantially equivalent" to a device that was on the market on or before May 26, 1976. *Medtronic, Inc. v Lohr* (1996) 518 US 470, 477, 135 L Ed 2d 700, 710, 116 S Ct 2240. The FDA determines that a Class III device is "substantially equivalent" to a pre-1976 device through the §510(k) clearance process. 21 USC §360e(b)(1)(B); *Lohr,* 518 US at 478. These distinctions are important because the Supreme Court has held that only devices that were approved by the FDA under the PMA process are entitled to federal preemption. *Riegel v Medtronic, Inc*. (2008) 552 US 312, 169 L Ed 2d 892, 905, 128 S Ct 999. Devices that are approved by the FDA by processes other than the PMA process (*e.g.,* the §510k process) are not entitled to federal preemption. *Lohr,* 518 US at 478.

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B. Preemption of Certain Medical Device Claims

§13.31 1. Express Preemption Under the MDA

Under the express preemption clause of the Medical Device Amendments (MDA) (21 USC §§360c-360n),

> no State or political subdivision of a State may establish or continue in effect with respect to a device intended for human use any requirement (1) which is different from, or in addition to, any requirement applicable under this chapter to the device, and (2) which relates to the safety or effectiveness of the device or to any other matter included in a requirement applicable to the device under this chapter.

21 USC §360k(a).

In order to find federal preemption under this statute, plaintiffs must show that the Food and Drug Administration (FDA) imposed a requirement on the device, that state law seeks to impose a requirement that is "different from, or in addition to" the FDA's requirement, and that these requirements relate to the safety or effectiveness of the device. *Riegel v Medtronic, Inc*. (2008) 552 US 312, 169 L Ed 2d 892, 902, 128 S Ct 999; *Medtronic, Inc. v Lohr* (1996) 518 US 470, 135 L Ed 2d 700, 710, 116 S Ct 2240.

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§13.32 2. Preemption of Claims for Premarket-Approved Class III Devices

The United States Supreme Court has held that the Medical Device Amendments (MDA) (21 USC §§360c-360n) preempt certain types of claims alleging defective devices that received PMA approval. *Riegel v Medtronic, Inc*. (2008) 552 US 312, 169 L Ed 2d 892, 904, 128 S Ct 999. In *Riegel,* the Court addressed issues left unresolved by *Medtronic, Inc. v Lohr* (1996) 518 US 470, 499, 135 L Ed 2d 700, 724, 116 S Ct 2240*,* and ruled that the premarket approval (PMA) process imposed federal requirements and that state common law product liability or negligence claims may impose requirements that are different from or in addition to those federal requirements. 169 L Ed 2d at 902. Because state law claims that parallel federal requirements are not different from or in addition to those federal requirements, they are not preempted. 169 L Ed 2d at 906.

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§13.33 3. Preemption of Private Right of Action to Enforce FDA Regulations

There is no private right of action to enforce Food and Drug Administration (FDA) regulations. *Buckman Co. v Plaintiffs' Legal Comm*. (2001) 531 US 341, 348, 148 L Ed 2d 854, 121 S Ct 1012. The Supreme Court held that a claim of fraud on the FDA based on state law was preempted because it would conflict with the FDA's sole responsibility to police fraud on the FDA. 531 US at 348. See *Medtronic, Inc. v Lohr* (1996) 518 US 470, 135 L Ed 2d 700, 116 S Ct 2240; *Brooks v Howmedica, Inc*. (8th Cir 2001) 273 F3d 785; *Desiano v Warner Lambert & Co.* (2d Cir 2006) 467 F3d 85, 96.

Acquiring or maintaining FDA approval through fraud or misrepresentation may eliminate a defendant's preemption defense. See *In re Medtronic, Inc., Implantable Defibrillators Litig.* (D Minn 2006) 465 F Supp 2d 886 (failure to fully comply with Congress's self-disclosure scheme may deprive defendant of federal preemption).

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§13.34 4. No Preemption of Non-Premarket-Approved Devices

In *Medtronic, Inc. v Lohr* (1996) 518 US 470, 500, 135 L Ed 2d 700, 724, 116 S Ct 2240, the United States Supreme Court held that there is no preemption of non-premarket-approved medical devices, because the Food and Drug Administration (FDA) had not imposed a "requirement" on such devices. See *Riegel v Medtronic, Inc*. (2008) 552 US 312, 169 L Ed 2d 892, 902, 128 S Ct 999.

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§13.35 5. No Preemption of "Parallel Claims"

State law claims that are premised on a violation of Food and Drug Administration (FDA) regulations or other federal law are not preempted. *Riegel v Medtronic, Inc*. (2008) 552 US 312, 169 L Ed 2d 892, 906, 128 S Ct 999; *Medtronic, Inc. v Lohr* (1996) 518 US 470, 495, 135 L Ed 2d 700, 721, 116 S Ct 2240. See *Bates v Dow Agrosciences LLC* (2005) 544 US 431, 447, 161 L Ed 2d 687, 125 S Ct 1788; *Buckman Co. v Plaintiffs' Legal Comm*. (2001) 531 US 341, 352, 148 L Ed 2d 854, 863, 121 S Ct 1012.

NOTE: This is a developing area of the law. Claims that would not be preempted would be, for example, a design defect claim based on a defendant's failure to follow the FDA-approved design, a manufacturing defect claim based on a defendant's failure to follow the FDA-approved manufacturing method or the FDA's regulations governing "good manufacturing practices" (see 21 CFR §820), or a failure to warn claim based on a defendant's failure to give the FDA-approved warning label.

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§13.36 6. No Preemption of Warranty and Consumer Claims

Claims for breach of express and implied warranties and for unfair trade practices are expressly exempted from Medical Device Amendments (MDA) (21 USC §§360c-360n) preemption by Food and Drug Administration (FDA) regulations. 21 CFR §808.1(d). See *St. Jude Med. Inc. Silzone Heart Valves Prods. Liab. Litig.* (D Minn, Jan. 5, 2004, No. 01-1396) 2004 US Dist Lexis 148 (implied warranty and consumer unfair trade practices claims not preempted).

Claims based on express warranty are not preempted, because they do not impose a requirement different from or in addition to a federal requirement. See *Bates v Dow Agrosciences LLC* (2005) 544 US 431, 445, 161 L Ed 2d 687, 704, 125 S Ct 1788. See also *Mitchell v Collagen Corp*. (7th Cir 1997) 126 F3d 902, 915 (express warranty claims not preempted); *Steele v Depuy Orthopaedics, Inc*. (D Minn. 2004) 295 F Supp 2d 439 (same). But see *Gomez v St. Jude Med.* (5th Cir 2006) 442 F3d 919, 932 (express warranty claims preempted).

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§13.37 7. Implied Preemption

Implied preemption may be enforced when a state law claim conflicts with a federal requirement. *Buckman Co. v Plaintiffs' Legal Comm*. (2001) 531 US 341, 352, 148 L Ed 2d 854, 863, 121 S Ct 1012.

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C. Preemption of Prescription Pharmaceutical Claims

§13.38 1. No Express Preemption of Pharmaceutical Claims

Unlike the provisions of the Medical Device Amendments (MDA) (21 USC §§360c-360n), which govern medical devices, the Food, Drug, and Cosmetic Act (FDCA) (21 USC §§301-399a) does not include an express preemption provision. Implied preemption and conflict preemption may govern prescription drugs. A conflict exists when either the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, or it is impossible for a party to comply with both state and federal law. See §11.44.

The Food and Drug Administration (FDA) approval of prescription drug warnings does not preempt state law claims alleging that a warning was inadequate. *Wyeth v Levine* (2009) 555 US ___, 173 L Ed 2d 51, 129 S Ct 1187 (plaintiff's arm amputated following prescription drug injection; Vermont Supreme Court held state law claim not preempted).

NOTE: The opinion in Wyeth appears to preclude three defense arguments: (1) Manufacturers would need FDA approval before adding warnings to a label; (2) primary responsibility lies with the FDA, not with manufacturers; and (3) allowing juries to find an FDA-approved warning inadequate would frustrate the purpose the FDA

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§13.39 2. Implied Preemption Granted

Cases finding implied preemption are *Conte v Wyeth, Inc.* (2008) 168 CA4th 89, 85 CR3d 299 (finding implied conflict preemption and relying on FDA preemption preamble in Metoclopramide gastroesophageal reflux case); *In re Bextra & Celebrex Mktg. Sales Practices & Prods. Liab. Litig.* (ND Cal 2006, Feb. 27, 2006, No. 05-cv-01699-CRB) 2006 US Dist Lexis 10902 (finding implied conflict preemption of claim for failure to warn but not for false advertising, relying on FDA preemption preamble in Bextra-Celebrex, cardiovascular risk case); and *Prohias v AstraZeneca Pharms., L.P.* (Fla App 2007) 958 So2d 1054 (finding implied conflict preemption in Nexium false advertising case). See also *Carter v Novartis Consumer Health, Inc.* (CD Cal 2008) 582 F Supp 2d 1271 (cough and cold medications and danger to children under 6; implied preemption under 21 USC §379r).

NOTE The United States Supreme Court has vacated the opinion in *Colacicco v Apotex, Inc*. (3d Cir 2008) 521 F3d 253, 260, remanded (2009) 173 L Ed 2d 672, 129 S Ct 1578, and remanded it for reconsideration in light of *Wyeth v Levine* (2009) 555 US ___, 173 L Ed 2d 51, 129 S Ct 1187. In *Colacicco,* the Third Circuit Court of Appeals relied on the preamble to the Food and Drug Administration's (FDA) labeling regulations. 21 CFR §§201.56-201.57. Known as the "Preemption Preamble," the preamble incorporates the FDA's legal position in support of preemption.

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§13.40 3. Implied Preemption Denied

The California Court of Appeal rejected the implied preemption argument in a case involving the prescription drug Metoclopramide, which is the active ingredient in several heartburn drugs and is alleged to cause dyskinesia, a symptom also associated with Parkinson's disease. *McKenney v Purepac Pharm. Co.* (2008) 167 CA4th 72, 83 CR3d 810. The court held that conflict preemption is limited to circumstances in which the Food and Drug Administration (FDA) has rejected the need for a warning that state law requires, and that plaintiff had not shown that the FDA considered and rejected the proposed warning. 167 CA4th at 83. See *In re Zyprexa Prods. Liab. Litig.* (ED NY 2007) 489 F Supp 2d 230 (no implied preemption in Zyprexa case); *In re Vioxx Prods. Liab. Litig.* (ED La 2007) 501 F Supp 2d 776 (no implied conflict preemption in Vioxx case); *Perry v Novartis Pharm. Corp.* (ED Pa 2006) 456 F Supp 2d 678, 685 (no implied preemption in Elidel case); *Jackson v Pfizer, Inc*. (D Neb 2006) 432 F Supp 2d 964 (no implied preemption in Effexor case); *Peters v AstraZeneca, LP* (WD Wis 2006) 417 F Supp 2d 1051 (no conflict preemption in omeprazole case); *Jackson v Pfizer, Inc.* (D Neb 2006) 432 F Supp 2d 964 (no conflict preemption in Zoloft-Effexor case); *Desiano v Warner Lambert & Co.* (2d Cir 2006) 467 F3d 85 (no implied conflict preemption in Rezulin case).

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Source: Torts/California Tort Guide/13 Pharmaceuticals and Medical Devices/§13.41 D. The Effect of a Recall on Preemption

§13.41 D. The Effect of a Recall on Preemption

Arguably, the recall of a product establishes that the product violated the basis of Food and Drug Administration (FDA) approval and is no longer entitled to preemption protection. Under 21 CFR §7.3(g), a recall is the removal or correction of a marketed product that the FDA considers to be in violation of the laws that it administers and against which the agency would initiate legal action. A recall is intended to protect the public health and well-being from products that present a risk of injury or gross deception or are otherwise defective and is an alternative to an FDA court action "for removing or correcting violative, distributed products." 21 CFR §7.40(a). Failure to comply with any postapproval requirement constitutes a ground for withdrawal of a premarket approval. 21 CFR §814.82(c).

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